Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

QUESTION 1:

AFTER A TEN WEEK TRIAL, A JURY FOUND THAT A CITY'S DELIBERATE ACTIONS TO DELAY AND ULTIMATELY DEFEAT A PROPOSED APARTMENT PROJECT WERE NOT SUBSTANTIALLY RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE. **DOES A CITY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN ITS ACTIONS TO DEFEAT A PROPOSED USE OF PROPERTY ARE PLAINLY ARBITRARY, IRRATIONAL, AND UNRELATED TO ANY LEGITIMATE GOVERNMENTAL INTEREST?**

QUESTION 2:

MUST A PROPERTY OWNER PROVE THE EXISTENCE OF A "VESTED RIGHT" OR OTHER SPECIFIC ENTITLEMENT UNDER STATE LAW IN ORDER TO RECEIVE THE PROTECTION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

LIST OF PARTIES and RULE 29.1 LIST

The Petitioners herein, Stubblefield Construction Company and Stubblefield Properties, were the plaintiffs in the trial court and the respondents and cross-appellants in the state appellate court proceedings. The City of San Bernardino, the Respondent herein, was a defendant in the trial court and appellant and respondent in the state appellate proceedings. Individually named defendants (Evlyn Wilcox, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, Norine Miller, and Steve Marks) were dismissed from the action by the trial court and were not parties to the appeals and are not parties herein.

Stubblefield Construction Company is a privately held California corporation and has no parent, subsidiary, or affiliate corporation. Stubblefield Construction Company is the general partner of Stubblefield Properties, a California General Partnership.

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On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stubblefield Construction Company and Stubblefield Properties respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, filed on January 27, 1995, and the Order Denying Rehearing entered on February 23, 1995.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, reported in *Stubblefield Constr. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 38 Cal. Rptr. 2d 413 (1995), is reprinted in the Appendix at A-1.[1] The summary orders of the Court of Appeal denying rehearing, App. at A-39, and the California Supreme Court denying the Petitioners' Petition for Review, App. at A-41, are unreported.

JURISDICTION

The judgment of the California Court of Appeal, Fourth Appellate District, was entered on January 27, 1995. App. at A-1. The Court of Appeal denied a timely petition for rehearing on February 23, 1995. App. at A-39. On April 20, 1995, the California Supreme Court denied a petition for review, Justice Arabian stating that review should be granted. App. at A-41.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[1] Hereinafter, "App." shall refer to the Appendix which follows the Petition. "RT___" shall refer to the Reporters' Transcript on Appeal filed in the California Court of Appeal, excerpts of which are reprinted in the Appendix at A-46. "JA ___" shall refer to pages of the Joint Appendix filed in the California Court of Appeal. "Exh." shall refer to exhibits introduced in evidence during the trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

STATEMENT OF THE CASE

This is a civil rights land use case brought in state court under 42 U.S.C. § 1983. It is significant, not only to the litigants, but to the burgeoning body of civil rights land use law in both the federal and state courts. As federal courts have restricted access through exhaustion and ripeness requirements, state courts have emerged as the "forum of choice" for plaintiffs suing local officials under Section 1983. S. Steinglass, *Section 1983 Litigation In State Courts* 1-1 (1988 & Supp. 1991). Litigation of federal constitutional claims in state court has virtually "exploded." *Id.* at 1-2. A significant number of the § 1983 cases filed in state courts involve land use issues. *Id.* at 2-50.

Petitioners Stubblefield Construction Company and Stubblefield Properties ("Stubblefield") proved to a state court jury during a 31-day trial that the deliberate, unprecedented obstruction of the approval of their 492-unit apartment project by City of San Bernardino ("City") officials violated their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. The jury's verdict was based on evidence that two City Council members spearheaded a campaign designed and orchestrated to scuttle its project by any means – fair or foul. The Court of Appeal acknowledged that the jury accepted the truth of this evidence, 32 Cal. App. 4th at 696, App. at A-5, but nonetheless decided that such underhanded activity could not – as a matter of law – have violated Stubblefield's rights.

After intentionally delaying the project's ministerial approval until a development moratorium was in place, the City Council, upon lifting the moratorium, downzoned the property from 638 residential units to 4. The jury returned a $11,537,000 verdict for Stubblefield, specifically finding by special interrogatory that the City's actions were not taken for a purpose substantially related to the public health, safety, morals, or general welfare, and were motivated with a purpose of intending to discriminate against Stubblefield. Judgment on Special Verdicts for Plaintiffs, App. at A-43 to A-44.[2]

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[2] Stubblefield argued that the jury should also have decided the issue of whether the City's actions were irrational and/or arbitrary. 32 Cal. App. 4th at 706 n. 10; App. at A-21 n. 10. Stubblefield's original proposed verdict form asked the jury to decide if the City's actions were arbitrary, irrational, or malicious. JA 783.

Raising The Federal Question

The eighth cause of action of Stubblefield's complaint alleged, among other things, that through a pattern of conduct deliberately engineered to block approval of its project, the City violated its rights to substantive due process and equal protection of the laws under the U. S. Constitution. JA 3, 34-36. A state court jury and judge agreed. JA 1036-39; App. at A-42 to A-45. Following entry of judgment, the trial court denied the City's motion for judgment notwithstanding the verdict, expressly finding that there was sufficient evidence to support the jury's verdict. JA 1293-94. Concurrently, the court granted a partial new trial limited solely to the issue of damages. JA 1294.

The Court of Appeal, throwing out the jury's verdict, held that the trial court should have granted the City's motion for JNOV. In the court's view, the case never should have gone to the jury since there was insufficient evidence, as a matter of law, to establish a substantive due process violation. 32 Cal. App. 4th at 710, 712, 715; App. at A-29, A-32, A-37.[3]

In its unsuccessful Petition for Review to the California Supreme Court, Stubblefield argued that the Court of Appeal had wrongly interpreted and applied the federal law relating to substantive due process under the Fourteenth Amendment. Throughout these proceedings, Stubblefield based its Section 1983 challenge on federal

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[3] The court also held that Stubblefield did not establish an equal protection violation. 32 Cal. App. 4th at 714; App. at A-36. Stubblefield does not challenge the court's equal protection determination in this Petition.

constitutional law, specifically the Due Process Clause of the Fourteenth Amendment. The federal question was thus raised at the earliest opportunity and pursued throughout the litigation.

Facts Material To The Questions Presented

Stubblefield's development application, filed under the City's "Review of Plans" process in May, 1986, complied with every City land use ordinance and regulation then in effect, seeking no deviations from the City's standard development criteria. RT 1294-95; App. at A-50 to A-51. Unrefuted testimony established that City regulations entitled Stubblefield to an imminent, ministerial approval; planning department staff could not deny Stubblefield's application: "It was a cut and dry review and approve." Testimony of former City Planning Director, Frank Schuma, RT 1185-86; App. at A-46 to A-47.[4] From the evidence, the jury concluded that Stubblefield's development did not proceed routinely through City Hall to the point where it would now be providing housing because of what the Court of Appeal itself called a "vendetta" orchestrated by City Councilman Steve Marks. 32 Cal. App. 4th at 711; App. at A-29. Although the Court of Appeal's discussion attempts to "spin" the facts in a manner that makes this "vendetta" sound like nothing

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[4] The Court of Appeal erroneously states that "some parts of the approval process, such as whether an EIR [environmental impact report] would be required, were discretionary." 32 Cal. App. 4th at 697 n.4; App. at A-7. Planning Director Schuma explained that no EIR was required under the Review of Plans process. RT 1280-81; App. at A-50 to A-51.

more than good old politics as usual, the facts – as the jury recognized – show something far more perverse.

The facts of this case resonate even more forcefully when read alongside those recited in the recent Third Circuit decision in *Blanche Rd. Corp. v. Bensalem Township*, 1995 U.S. App. LEXIS 12802 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 15990 (1995) (en banc). There, the court not only held that such politics as usual cannot be constitutionally tolerated, but the court personally rebuked the individual Township officials in denying them any sort of immunity:

> If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road project by ordering that Blanche Road's applications be reviewed with greater scrutiny in order to slow down the development and by ordering that efforts be taken to shut down the development, such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity.

Id. at *43.

The *Blanche Road* facts pale in comparison to what the jury found to have happened to Stubblefield. The evidence below is so clear and uncontradicted that, even in defending the City, the Court of Appeal had to concede that City officials, driven by Councilman Steve Marks, blocked approval of Stubblefield's project with a deliberate, unprecedented campaign. 32 Cal. App. 4th at 697-98; App. at A-7 to A-9.[5] It describes Marks' actions deliberately calculated to insure the project's demise:

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[5] The following discussion focuses on Marks because the evidence shows he was the prime mover behind the municipal

- Marks imposed a height limitation and conditional use permit requirement specifically "aimed at the Stubblefield project." *Id.* at 697; App. at A-7.[6]

- Marks ramroded an urgency measure through the City Council designed to defeat the project by wiping out the City's long-standing policy of processing a development application under the regulations in effect when the application was filed and imposing a 30-day time limit for final project approval. *Id.* at 698; App. at A-8 to A-9. The Court of Appeal concedes that there was absolutely "no justification" for the emergency measure "except the desire to block approval of the Stubblefield Project." *Id.* at 698; App. at A-8.

- Marks then fashioned a procedure which allowed him to appeal a favorable ruling on the project by the City's Environmental Review Committee so he could delay final project approval beyond the 30-day deadline he had devised. *Id.*; App. at A-9. This maneuver permitted Marks to "appeal" an issue to the City Council so that he, as a member of the Council, could sit in judgment on the validity of his own appeal.

- City officials thereafter stalled a request by Stubblefield to "grandfather" its project from early December,

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war on Stubblefield. Plainly, however, Marks could not have accomplished his goal without the active cooperation of his colleagues on the City Council, a majority of whom had to vote with him at every turn. Whatever the means, it was official City action that destroyed Stubblefield's project.

[6] Even after the City adopted its "new standards," Stubblefield met all requirements except the height limitation which Marks had inserted for the express purpose of scuttling the project. RT 2434-33, 2578.

1986, through March, 1987, until the City imposed a new development moratorium. *Id.* at 699; App. at A-10 to A-11.[7]

For the Court of Appeal, Marks' Machiavellian resort to "all means within his power" to defeat the project, *id.* at 711; App. at A-29 to A-30, exemplified the "democratic process at work." *Id.* at 714 n.19; App. at A-36. To make its conclusion more palatable, the court omits any reference to the *means* Marks employed. In the administrative arena, Marks threatened and intimidated Planning Director Schuma with termination if he did not accelerate general plan revisions designed to downzone the Stubblefield property and preclude project approval. RT 1264, 1358-59. And, in the legislative sphere, Marks bullied and intimidated a Council colleague, threatening him with denial of future projects in his Council district if he supported the Stubblefield project. RT 1452-55. But, for the court below, this "vendetta" represented an appropriate response to "concerns of constituents . . . and other political concerns." 32 Cal. App. 4th at 711; App. at A-29.

As noted by the appellate court, the actions to undermine the Stubblefield project did not end when Steve Marks vacated his council seat in January 1987. On January 19, 1988, after tabling Stubblefield's grandfathering

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[7] Stubblefield's "grandfathering" request sought a waiver of Marks' discriminatory height limitation so it could proceed under the rules in effect when its application was filed, consistent with long-standing City policy. RT 1252-53; App. at A-49 to A-50. Stubblefield's request was essentially a request for a variance, a permit which allows a landowner to deviate from certain development standards such as building height. RT 1903-04; 1908-09.

request for fifteen months without explanation, the City held a "hearing" on the grandfathering application. *Id.* at 699-700; App. at A-11 to A-12. The court fails to explain that this "hearing" happened only after Michael Maudsley, Marks' hand-picked successor, asked the new Planning Director how the City could "get rid of the project" and directed her to draft a motion to put it "to rest once and for all." RT 1813; Exh. 74. When the City "summarily denied" Stubblefield's request to address the Council, *id.* at 700; App. at A-12, it violated consistently observed City policy, RT 1764-65; Exh. 67, and ignored a public hearing notice which it had published in the local newspaper. When asked why the Council had refused Stubblefield the right to speak, the Mayor explained, "the Council had met [in closed session], they had all made up their mind that this project was going down to defeat, so why talk about it." RT 2614.

Finally, in June, 1989, when the City lifted the two-year moratorium, the Council downzoned the Stubblefield property from 638 units to 4. RT 2807, 3234-37. Overwhelming evidence established that the downzoning of the Stubblefield property occurred, not as an incidental, unforeseen consequence of the actions of City officials, but as the intended result of their meticulously executed plans.

REASONS FOR GRANTING THE PETITION

I.

FEDERAL CIRCUIT COURTS HAVE REPEATEDLY VOICED AN ACUTE NEED FOR GUIDANCE FROM THIS COURT IN REVIEWING CLAIMS OF PROPERTY OWNERS DEPRIVED OF SUBSTANTIVE DUE PROCESS

For some time now, federal circuit courts and law journals have been noting both the lack of uniformity and the dearth of Supreme Court guidance in an area of constitutional law which this Court has described as a "treacherous field." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977). A typical observation appears in *Pearson v. City of Grand Blanc*:

> The circuits are in substantial disagreement on the role of the federal courts in reviewing zoning claims of this kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, it has never laid down definitive standards of review . . . The lack of uniformity among the circuits, in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable."

961 F.2d 1211, 1217 (6th Cir. 1992).[8]

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[8] *See also RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 914 (2d Cir. 1989) (federal courts have charted "uneven course" in explicating how substantive component of Due Process Clause protects landowners in disputes with local agencies); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (law unsettled in Eighth and other circuits as to "parameters of substantive due process in zoning cases . . . . "); *Lemke v.*

Legal journals have echoed the courts' statements. *See, e.g.*, Comment, *Giving Property All The Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 Cath. U.L. Rev. 703, 704 (1992) (Supreme Court opinions fail to provide "coherent guidelines" for analysis of substantive due process claims, causing lower courts to proceed with "little direct guidance" regarding whether and when arbitrary and capricious deprivations of property rights implicate substantive due process); *see also* Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. Dayton L. Rev. 313, 315 (1991) (survey of lower court decisions suggests Supreme Court has "failed to provide guidance" as to when substantive due process applies).

The circuit courts also lack consistent legal standards concerning the type of property interest which triggers substantive due process guarantees. *See Deblasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598 (3d Cir. 1995) (issue of "whether and when state-created property interests invoke substantive due process concerns" undecided by Supreme Court); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991).

This case affords the Court the opportunity to establish standards and restore needed uniformity in an area of the law "famous for its controversy, and not known for its simplicity." *Deblasio*, 53 F.3d at 598 (citing *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987)).

Cass County, 846 F.2d 469, 470-71 (8th Cir. 1987) (en banc) (whether substantive due process claim may arise from denial of zoning permit an open question in Eighth Circuit).

II.

A STARK AND IRRECONCILABLE CONFLICT EXISTS IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER ARBITRARY AND IRRATIONAL ACTIONS OF GOVERNMENT OFFICIALS WHICH HAVE NO SUBSTANTIAL RELATION TO A LEGITIMATE GOVERNMENTAL INTEREST VIOLATE A PROPERTY OWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

In November, 1991, this Court granted a petition for certiorari in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992), limited to the question of whether an arbitrary, capricious or illegal denial of a construction permit to a developer can state a substantive due process claim under 42 U.S.C. § 1983. Following briefing and oral argument, the Court dismissed the writ as improvidently granted, leaving the question undecided.

The first question presented in this Petition is essentially the same question as that presented in *PFZ Properties* – but with a factual record fully developed at trial. The need to have this question decided has not dissipated since 1991; if anything, it has intensified. Conflicting decisions have proliferated in the circuit courts and two sharply distinguishable paths have been carved out to determine how and when a property owner has been deprived of its right to substantive due process of law.

The federal circuits have split into two principal camps: those which have followed the "rational relation" test first applied in a land use context in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), and those which have established their own *ad hoc* tests, unsupported by any authority from this Court. The first group

includes the overwhelming majority of circuits which consistently hold that deliberate, arbitrary, and irrational interference with a development approval violates an owner's substantive due process rights. The second group consists principally of the First Circuit which has consistently held that even bad faith actions of local officials purposefully and maliciously intended to obstruct a development approval do not violate a property owner's substantive due process rights. There are intracircuit conflicts in both the Seventh and the Eighth Circuits, with some panels applying the *Euclid* test and others fashioning additional, gratuitous requirements.

Moore v. City of East Cleveland characterizes *Euclid* as "this Court's leading land-use case." 431 U.S. at 498. *Euclid* held that governmental regulations restricting an owner's use of his land will be found unconstitutional under the substantive component of the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Two years later, the Court reiterated the test in *Nectow v. City of Cambridge*:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. . . . the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained.

277 U.S. 183, 187-88 (1928).

The Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have consistently applied the

Euclid and *Nectow* rational relation test in cases where landowners have alleged substantive due process violations based upon malicious, irrational, or plainly arbitrary actions of government officials.[9]

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[9] *See Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (land owner states claim where there exists "no rational basis" for revocation of permit); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (citing *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) (substantive due process proven if actions not rationally related to a legitimate government interest or motivated by bias, bad faith, or improper motive), *cert. denied*, 503 U.S. 984 (1992)); *Geo-Tech Reclamation Indus., Inc. v. Hamrick, III*, 886 F.2d 662, 666 (4th Cir. 1989) (question is whether challenged regulation is arbitrary and capricious, having no substantial relation to its purported goal); *Shelton v. City of College Station*, 780 F.2d 475, 477 (5th Cir.1986) (en banc) (in absence of invidious discrimination or infringement of fundamental interests, property owner's due process claim confined to whether the decisions were arbitrary and capricious, which test is met if there is rational basis for decision); *Pearson v. City of Grand Blanc*, 961 F.2d at 1221, 1223 (substantive due process violation exists where administrative action is arbitrary and capricious, meaning there is no rational basis for decision or is clearly arbitrary and unreasonable in that it has no substantial relation to public health, safety, morals, or general welfare); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (citing *Sinaloa Lake Owners' Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (landowner must prove challenged actions are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"), *cert. denied*, 494 U.S. 1016 (1990); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d at 1119 (in absence of invidious discrimination, suspect class, or infringement of fundamental interest, review limited to determining whether decision was arbitrary and capricious); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994) (deprivation of property interest rises to level of substantive due process violation if done for improper motives

In sharp contrast, the leading First Circuit substantive due process cases, which the California Court of Appeal heavily relied on in this case, fail to even cite *Euclid*, much less apply it.[10] *PFZ Properties* relies primarily on *Creative Environments* and *Chiplin Enterprises; Chiplin Enterprises* relies primarily on *Creative Environments;* and *Creative Environments* appears to draw its substantive due process formulation out of thin air. Small wonder that the law in the First Circuit has strayed so far from the constitutional underpinnings established by this Court.

The First Circuit's aberrant position has not gone unnoticed by the other circuits. The Sixth Circuit has commented on the First Circuit's reluctance to recognize landowners' claims,[11] and the Eighth Circuit observes, "[t]he First Circuit has consistently held that a § 1983 claim may not be based on a denial of a permit, even if the denial was malicious, in bad faith, and for invalid and illegal reasons." *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986).

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and achieved through means that are arbitrary and capricious, and lacking any rational basis).

[10] *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524, 1526-28 (1st Cir. 1983); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983); *PFZ Properties, Inc.*, 928 F.2d at 32.

[11] *Pearson v. City of Grand Blanc* explains that in the First Circuit substantive due process is not violated "even when accompanied by claims of purposeful, malicious obstruction of a landowner's rights." 961 F.2d at 1217. The First Circuit "precludes the trial court from inquiring into actual as opposed to the declared motives of the local legislative body . . . . " *Id.* (footnotes omitted).

Decisions of Seventh Circuit panels reveal a split within their ranks over what constitutes a substantive due process violation. Some panels have applied the "rational basis" test of *Euclid*.[12] Others have imposed an additional requirement, requiring plaintiffs to allege the violation of *another* constitutional interest or to establish the inadequacy of state remedies.[13]

The Eighth Circuit, too, is split. Although a case decided in 1987 applied the rational relation test,[14] subsequent cases have held that a property owner must allege and prove "something more" than that the governmental decision was arbitrary or capricious.[15]

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[12] *See, e.g., Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990) (citing *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926))).

[13] *See, e.g., Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990).

[14] *See Littlefield*, 785 F.2d at 607 (substantive due process claim stated where plaintiffs alleged City acted capriciously and arbitrarily by imposing unconstitutional condition on granting of permit).

[15] *See, e.g., Lemke v. Cass County*, 846 F.2d 469 at 472 (Arnold, J., concurring) (decision must be "truly irrational – for example, a zoning board's decision made by flipping a coin . . . . "); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) (substantive due process properly reserved "for truly egregious and extraordinary cases," the court stating that it would have rejected the substantive due process claim "even if the City had knowingly enforced the invalid zoning ordinance in bad faith . . . . ").

To state that the law in the circuits is in disarray is putting it mildly. It is time for some principled consistency to be introduced into what has become unwieldy chaos in order that landowners may know, with some degree of uncertainty, the nature and scope of their rights.

III.

LEADING DECISIONS IN THE STATE COURTS ARE AS SPLINTERED AS THOSE IN THE FEDERAL CIRCUITS ON THE ISSUE OF WHETHER ARBITRARY AND IRRATIONAL ACTIONS OF GOVERNMENT OFFICIALS VIOLATE A PROPERTY OWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

Not surprisingly, the decisions of the highest courts of several states reflect the same conflicting legal analysis on this question of federal law as the federal circuit courts have demonstrated. For example, the Washington Supreme Court applies the rational basis test, relying on cases from the Third, Ninth, and Eleventh Circuits (challenged government action must be "wholly arbitrary and capricious or irrational or utterly fail[ ] to serve a legitimate purpose"). *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992). In contrast, the Supreme Judicial Court of Massachusetts, expressly declining to determine which approach "is correct as a matter of law," has simply applied the law of the First Circuit where it is located, citing *Creative Environments, Chiplin Enterprises*, and *PFZ Properties. Freeman v. Planning Bd.*, 419 Mass. 548, 558, 646 N.E.2d 139 (1995).

And, to complete the cycle of diversity, the Minnesota Supreme Court has applied the law of the Eighth

Circuit where it is located, finding that the theory of substantive due process is reserved for "truly egregious and extraordinary cases," citing *Condor Corp. v. City of Saint Paul*, 912 F.2d at 220, and other Eighth Circuit cases. *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 688, 1991 Minn. LEXIS 39 (1991).

Unlike these three state supreme courts, the California Court of Appeal in the present case chose to disregard both the law of the Ninth Circuit where it is located and the majority of federal circuits, selecting instead the law of the circuit which is the farthest removed geographically and in a legal minority of one – opposed, contradicted, and rejected by the majority of all the federal circuits. Without direction from this Court, courts of the fifty states will be free to pick and choose whatever law suits their fancy based on local parochial or political interests, thereby encouraging plaintiffs to engage in the most egregious type of forum shopping between federal and state courts.

IV.

THE CIRCUITS ARE ALSO IN SHARP CONFLICT ON THE ISSUE OF WHETHER OWNERSHIP IS A SIGNIFICANT PROPERTY INTEREST WORTHY OF SUBSTANTIVE DUE PROCESS PROTECTION

The Court of Appeal's decision in this case presents a subsidiary question which, like the first question of whether the Due Process Clause affords a remedy for arbitrary and capricious conduct, finds sharp division among the federal circuits. In addressing this second

issue, the courts have articulated two conceptually distinct approaches to deciding what type of property interest a landowner must possess in order to establish a substantive due process claim.

Four circuits have expressly held, or implicitly assumed, that property ownership alone entitles a person to constitutional protection under the Fourteenth Amendment. Most recently, the Third Circuit held that,

> ownership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Deblasio, 53 F.3d at 600-01.

The Ninth Circuit assumes that a property owner has a sufficient property interest to assert a substantive due process challenge.[16] Similarly, the First Circuit does not appear to scrutinize the presence or absence of a property

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[16] Leading Ninth Circuit substantive due process decisions involving real property in California, which has one of the most stringent vested rights rules imaginable, do not involve a single owner who possessed a vested right. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990); *Sinaloa*, 882 F.2d 1398; *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *amended, reh'g denied*, 857 F.2d 567 (1988) (en banc), *cert. denied*, 489 U.S. 1090 (1989).

owner's "protected interest."[17] And, the Eighth Circuit appears only to require a property interest beyond property ownership when the claim is based on *procedural*, as opposed to substantive, due process. *See, e.g., Littlefield*, 785 F.2d at 600.

In striking contrast, four circuits have embarked on a peculiar path to deny property owners the right to challenge arbitrary and irrational government actions. They have devised an additional requirement based upon *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), employment cases where the Court found no traditional property interest to exist.[18] Both *Roth* and *Perry* involved intangible rights – the right of nontenured faculty members to continued employment – not a right grounded in ownership of real property. The issue was whether a statute or other form of government action created a protected property interest where one did not otherwise exist. It would appear that the Court intended to expand the concept of property, not contract it as later courts have done. Significantly, since *Roth* and *Perry*, this Court has continued to accept mere property

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[17] This is largely immaterial, however, since the First Circuit refuses to recognize such claims in any event.

[18] Noting that this Court has never required such a threshold inquiry, the court in *RRI Realty Corp.* comments, "[i]t is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously. 870 F.2d at 918.

ownership as a sufficient interest on which to base substantive due process claims.

The Second, Fourth, Sixth and Eleventh Circuits have, in varying degrees, applied the *Roth* "entitlement analysis" to substantive due process cases, requiring a property owner to first establish an "entitlement" to a permit under state law before he may assert a substantive due process claim under the Fourteenth Amendment.[19] The courts applying the "entitlement analysis" generally look to the amount of discretion vested in the permitting authority, finding that where discretion exists to deny a permit, a sufficient property interest does not exist.[20]

The Seventh Circuit is divided on this issue. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 156-66 (7th Cir. 1994) (fee simple ownership is property interest giving rise to substantive due process protection). *But see New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990) (before party may assert substantive due process argument, it must establish "legitimate claim of entitlement" to the right asserted). The same conflict exists within the Tenth Circuit. Some panels require a plaintiff to allege a liberty or property interest to which due process guarantees attach; others

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[19] *See, e.g., RRI Realty Corp.*, 870 F.2d at 915-18; *Scott v. Greenville County*, 716 F.2d 1409, 1418-22 (4th Cir. 1983); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995).

[20] *See RRI Realty Corp.*, 870 F.2d at 918 (entitlement analysis focuses on "degree of official discretion. . . . "); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992) (legitimate claim of entitlement turns on whether "local agency lacks *all* discretion to deny" permit); *Triomphe Investors, Inc.*, 49 F.3d 198 at 202 (to establish property interest, landowner must prove zoning board did not have discretion to deny land use sought).

view substantive due process rights as founded upon "deeply rooted notions of fundamental personal interests derived from the Constitution." *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d at 1119. Neither the Fifth Circuit nor the D.C. Circuit appears to have addressed the issue.

Neither this Court nor any federal circuit court has taken the extreme position adopted by the California appellate court in this case that constitutional protection is conditioned upon proving a "vested right" under state law.[21] This Court has never required an owner of *real property* to establish an "entitlement" to a constitutionally

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[21] The court below framed the issue as "whether plaintiffs had a property right protected by the due process clause, *i.e., whether plaintiffs had a vested right to develop their property.*" 32 Cal. App. 4th at 706; App. at A-22 (emphasis added). Looking to *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785 (1976), the court concluded that Stubblefield had no vested right to build because it had not applied for or received a building permit for its project. *Id.* at 708; App. at A-25. Engrafting a "vested rights" concept on this constitutional claim is contrary to this Court's consistent jurisprudence which nowhere mentions such an idea. Presumably, had this Court intended to say the possession of "vested rights" was a necessary predicate to constitutional litigation, it could have done so. The Ninth Circuit recently contrasted the two doctrines:

> "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity."

Lakeview Dev. Corp. v. City of S. Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990) (citation omitted).

protected property interest in order to state a claim for substantive due process. In the early substantive due process cases of *Euclid*, *Nectow*, and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) this Court *assumed* that a property owner had a sufficient interest to challenge interference with the legitimate use of his property. In *Roberge*, the Court writes: "[t]he right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. 278 U.S. at 121.

This Court has consistently upheld the constitutional principle enunciated in these early substantive due process cases – that a property owner has a constitutional right to put his property to legitimate use without arbitrary or irrational governmental interference. Not surprisingly, the Court's more recent decisions on property owners' claims of governmental suppression of property rights all look to *Euclid* and affirm its clear holding and underlying rationale.[22] Each of these cases reiterates the fundamental principle that property owners have a *right* to be free of arbitrary or irrational governmental actions which interfere with their right to develop property within legitimate limits established under law.[23]

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[22] *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976). *See also id.* at 681, 683 (Stevens, J., dissenting) (owner of real property has *right* to develop his land to his economic advantage, and applying for a zoning amendment is aspect of property ownership protected by Due Process clause of Fourteenth Amendment); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 263 (1977).

[23] This same notion is articulated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), where this Court

Petitioners urge the Court to restore in all of the circuits a concept of property rights following this Court's consistent pronouncements.

V.

THE CALIFORNIA COURT'S ERRONEOUS DECISION IN THIS CASE STRAYS EVEN BEYOND THE ERRANT STANDARD ESTABLISHED IN THE FIRST CIRCUIT TRILOGY OF CASES ON WHICH IT RELIES AND LAYS THE GROUNDWORK FOR FURTHER EROSION OF PROPERTY OWNERS' RIGHTS IN ALL FIFTY STATES

The California Court of Appeal apparently bought into the idea that as long as elected officials are doing what a majority of their constituents want them to do, their actions are insulated from all judicial scrutiny. Its cavalier endorsement of City officials' calculated, obstructive tactics, without any analysis of whether the actions advanced any *legitimate* governmental purpose or whether the motives and tactics employed by the City

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stated that the "right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.' " The same point was reiterated in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 n.7 (1992), where this Court noted that constitutional protection was required because Mr. Lucas held a fee simple interest in the property, "an estate with a rich tradition of protection at common law . . . . " And even though the constitutional challenges in *Nollan* and *Lucas* rested upon the "Takings Clause" of the Fifth Amendment, there is no principled basis for distinguishing a property owner's constitutionally protected interest under the Takings Clause of the Fifth Amendment and the substantive component of the Due Process Clause of the Fourteenth Amendment.

were legally permissible, signals a startling departure from settled substantive due process law.

A substantive due process challenge to official action must satisfy a two-part test: does the action serve a legitimate *purpose* and are the *means* employed rationally related to the legitimate purpose? *Moore*, 431 U.S. at 498 n.6. Under any of the common formulations, a court's inquiry must focus first upon the *objective or purpose* to be achieved and then upon the relationship between the action taken (the "means") and the stated purpose (the "end"). Moreover, "[t]he guaranty of due process, as has often been held, demands . . . that the means selected shall have a *real and substantial* relation to the objective sought to be attained." *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 84-85 (1980) (emphasis added).

The federal circuit courts have uniformly found substantive due process violations where actions of local officials are specifically directed at blocking a development project approval.

Thus, the Third Circuit recently upheld the claim of a property owner who, like Stubblefield, had alleged – and proved to a jury – that local officials had conspired to delay and ultimately shut down its development project:

> [P]laintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. *Such actions, if proven, are sufficient to establish a substantive due process violation* . . . .

Blanche Rd. Corp. v. Bensalem Township, 1995 U.S. App. LEXIS 12802 at *38-39 (emphasis added). The California Court of Appeal stands alone in finding that an intentional goal of blocking a development project that otherwise meets all the requirements for approval in order to mollify political pressures is a *legitimate* governmental goal.[24] The court below entirely circumvented this Court's mandated two-step analysis, refusing to give consideration to the *objective* or *purpose* which Steve Marks and other City officials sought to achieve and failing to even question whether the chosen means were substantially related to a legitimate purpose. The court concedes that the actions of Marks and Maudsley "were taken with the Stubblefield project in mind, and *were taken for the purpose of blocking the project*. . . ." 32 Cal. App. 4th at 714.

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[24] *See, also, Brady v. Town of Colchester*, 863 F.2d at 216 (substantive due process rights violated by city's "substantial departure from normal practices"); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *cert. denied*, 488 U.S. 851 *and* 488 U.S. 868 (1988) (substantive due process claim stated where officials improperly interfered with permit issuing process); *Scott v. Greenville County*, 716 F.2d at 1420 (due process rights violated where moratorium and downzoning were "directed solely" at the property owner); *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (substantive due process claim stated where property owner denied conditional use permit as a result of neighborhood pressure); *Littlefield v. City of Afton*, 785 F.2d at 607 (substantive due process claim stated when city arbitrarily imposed dedication condition on issuance of permit); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991) (substantive due process claim stated where officials obstructed application for a rent increase); and *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991) (substantive due process claim stated where actions undertaken for improper motive).

App. at A-35 (emphasis added). To the court below, however, Marks' undisguised "vendetta" against the project and his resort to "all means within his . . . power" to defeat it, *Id.* at 711; App. at A-29 to A-30, did not constitute arbitrary or irrational treatment. As acknowledged by the court, the jury disagreed: "Under plaintiffs' theory of the case, which was apparently accepted by the jury, the City officials arbitrarily acted to prevent plaintiff from developing its property." *Id.* at 696; App. at A-5.[25]

The court might have kept on track if it had examined the motives behind the official actions rather than viewing them as irrelevant. Federal circuit courts have consistently stepped in to examine the motives behind the official conduct when local officials act with the express motive or purpose of depriving a property owner of a project approval to which it is otherwise legitimately entitled.[26]

The court below went astray in blindly following the First Circuit in three particulars: it refused to examine the legitimacy of the City's goals; it refused to consider City officials' motives and means; and it insisted on equating a

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[25] To be sure, the court did not "read the record in the light most advantageous to the plaintiff, resolve all conflict in his favor [or] give him the benefit of all reasonable inferences in support of the original verdict" as required by California law. 32 Cal.App. 4th at 703; App. at A-17.

[26] *See Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989) (citing *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989)); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Sinaloa*, 882 F.2d at 1407-08; *Blanche Rd. Corp. v. Bensalem Township*, 1995 U.S. App. LEXIS 12802 at *38-39.

vested right under state law with a constitutionally protected property interest. But even in the First Circuit cases which have rejected substantive due process claims, the plaintiffs did not allege, much less prove, a blatant, concerted campaign directly aimed at obstructing a development project as Stubblefield established in this case.

And, even if an entitlement analysis were applicable here, which it plainly is not, Stubblefield's property interest would be sufficient to establish its due process claim, for under the applicable City procedures, a project had to be approved if, as here, it met all the stated requirements. RT 1185-86; App. at A-47 to A-49. While the vested rights doctrine estops the government from altering the rules after a permit has been issued and relied upon, the Due Process Clause protects property owners from malicious and arbitrary governmental action even when owners do not have the protection of a vested right. Any rule that followed the Court of Appeal's formulation would leave property owners without a remedy – a result patently offensive to historical concepts of due process.

CONCLUSION

It is painfully apparent that the conflicts in and among the federal circuit courts and the highest courts of several states on the two questions presented in this Petition will not be resolved by future cases. The recurring nature of the issues presented here reflect a demonstrable need for uniform rules for all property owners and all courts – both federal and state. The issues are not only alive but promise to continue to confuse and confound the courts. Property owners in some states and some circuits are subject to liabilities or entitlements that property owners in other geographic areas of the country are not burdened with or entitled to. The Petition for Certiorari should be granted so this situation may be rectified and all property owners accorded their right of substantive due process under the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeal, Fourth District, Division Two, State of California, Reported at 32 Cal.App. 4th 687, filed January 27, 1995 ..... A-1

Order Modifying Opinion And Denying Petition For Rehearing And Certifying Opinion For Publication, filed February 23, 1995..... A-39

Order of the California Supreme Court Denying Petition For Review, dated April 20, 1995..... A-41

Judgment On Special Verdicts For Plaintiffs, entered April 10, 1991..... A-42

Excerpts from Reporters' Transcript On Appeal – Testimony of Frank Arnold Schuma..... A-46

APPENDIX

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO., et al., Plaintiffs and Appellants, v. CITY OF SAN BERNARDINO, Defendant and Respondent. [AND RELATED CROSS-APPEALS]	)	E009749 (consol. with E010088) (Super.Ct.Nos. 242998 and 252058) **OPINION** (Filed Jan. 27, 1995)

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Reversed.

Hill, Farrer & Burrill, Darlene Fischer Phillips and Dean E. Dennis for Plaintiffs and Appellants Stubblefield Construction Company and Stubblefield Properties.

MacLachlan, Burford & Arias, Christopher D. Lockwood and Joseph Arias, James F. Penman, City Attorney, and Henry Empeño, Jr., Deputy City Attorney, for Defendant and Respondent City of San Bernardino.

This is an action for violation of plaintiffs' civil rights under 42 U.S.C.A. section 1983. The action arose out of defendant City's handling of plaintiffs' application to build apartment buildings on a 29.3-acre parcel in the

northeastern foothills of the City. Plaintiffs contend that the City violated their substantive due process and equal protection rights by allegedly deliberately inflicting harm "when [City officials] irrationally and arbitrarily manipulated City processes and procedures, for no legitimate reason, so as to prevent Stubblefield from building a development Project it was unquestionably entitled to build."

PROCEDURAL HISTORY

On April 18, 1988, plaintiffs Stubblefield Construction Company and Stubblefield Properties (herein "plaintiffs" or "Stubblefield") filed a petition for writ of mandate and complaint for declaratory relief, preliminary and permanent injunctions and damages against the City of San Bernardino, the members of its Common Council, the mayor, and Steve Marks, a former councilman (case no. 242998; herein "*Stubblefield I*"). Eleven causes of action were alleged, including an eighth cause of action for deprivation of civil rights under 42 U.S.C.A. section 1983.

On November 4, 1988, the City filed an amended cross-complaint for apportionment of fault and indemnification.

On September 29, 1989, plaintiffs filed an action challenging the validity of the City's revised General Plan (case no. 252058; herein "*Stubblefield II*"). The action was based on events occurring after events in *Stubblefield I*. Plaintiffs then filed a motion to consolidate *Stubblefield I* and *Stubblefield II*. The motion was granted and the cases were consolidated for trial.

At the commencement of trial, the court initially ordered a jury trial on the eighth cause of action in *Stubblefield I* (alleged violation of civil rights under 42 U.S.C.A. § 1983) and the seventh cause of action in *Stubblefield II* (insofar as it related to damages sustained under 42 U.S.C.A. § 1983). All other causes of action in both cases were to be tried to the court sitting without a jury after the jury trial.

The case was submitted to the jury for a special verdict on six questions. The first three questions related to plaintiffs' claim that the City violated plaintiffs' substantive due process rights. The remaining three questions related to the issue of whether the City violated plaintiffs' equal protection rights in connection with plaintiffs' proposed apartment project.

The jury found that defendant City of San Bernardino's actions with regard to Stubblefield's proposed apartment project were (1) not taken for a purpose substantially related to the public health, safety, morals, or general welfare[1] and (2) were motivated with a purpose

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[1] This is a test apparently deprived from the leading zoning case of *Euclid v. Ambler Co.* (1926) 272 U.S. 365. In that case, the Supreme Court held that, before a zoning ordinance could be held unconstitutional, the court must find that the "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Id.*, at p. 395; see, also, *Moore v. East Cleveland* (1977) 431 U.S. 494, 498, fn. 6; *Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1407-1409; *Greenbriar, Ltd. v. City of Alabaster* (11th Cir. 1989) 881 F.2d 1570, 1577.) The question of whether the actions here were arbitrary or unreasonable was not put to the jury.

of intending to discriminate against Stubblefield. It further found that the City's actions caused plaintiffs damages in excess of 11.5 million dollars.

Judgment on the jury's special verdict was entered on April 10, 1991, and plaintiffs dismissed the remaining causes of action in *Stubblefield I* with prejudice.

The trial court subsequently granted the City's motion for new trial on the issue of the amount of damages. It denied the City's motion for a new trial on the liability issues.

APPEALS

1. The City's Appeals.

Following the jury's verdict, the City filed a motion for judgment notwithstanding the verdict. The trial court denied the motion and the City appeals. The City also filed a cross-appeal from the judgment.

The trial court also made an interim award of attorney fees to plaintiffs. The City appeals that order.

2. Plaintiffs' Appeals.

The City also filed a motion for new trial. As noted above, the trial court granted the motion on the issue of damages only. Plaintiffs appeal the granting of the motion for new trial on the damages issue.

Plaintiffs also requested review of rulings of the trial court (1) denying their motion to file a supplemental pleading; and (2) granting defendant's motion for a nonsuit as to defendant Steve Marks, a former councilman.

Plaintiffs filed a notice of cross-appeal from the judgment, including the order granting defendant's motion for a nonsuit as to defendant Steve Marks.

3. Rulings of this Court.

In response to a motion filed by the City on September 20, 1991, this court dismissed plaintiffs' cross-appeal from the judgment by an order filed October 21, 1991, and a partial remittitur was issued on December 24, 1991. Ruling was reserved on other orders made on March 5, 1991. This court said: "The effect of the dismissal of [Stubblefield's] purported cross-appeal is to bar any appeal of the order of dismissal of Steve Marks, who is, therefore, not a party to this appeal. Any review of the order of March 5, 1991, is limited to its effect, if any, on the granting of the motion for new trial Stubblefield appealed by its notice filed July 9, 1991."

FACTS

Under plaintiffs' theory of the case, which was apparently accepted by the jury, the City officials arbitrarily acted to prevent plaintiff from developing its property. Plaintiffs alleged a number of actions which the City officials took to allegedly further this plan. Viewing the evidence in the light most favorable to plaintiffs, the factual basis for plaintiffs' claim is summarized in this section.[2]

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[2] Plaintiffs called as witnesses the members of the City Council at the time various actions were taken, two former mayors, two heads of the Planning Department, and various

Arnold Stubblefield testified that his company purchased approximately 600 acres of land in the foothills northeast of the City of San Bernardino in the early 1960's. He commenced planning a community to be known as Mountain Shadows. Homes were built in the area from 1964 through 1968.

In 1968, Mr. Stubblefield consented to the annexation of the property by the City. Mr. Stubblefield and a former mayor testified that Mr. Stubblefield was promised the zoning necessary to implement the master plan if he consented to the annexation. The City knew that Stubblefield would rely on its assurances and the City intended that it do so.[3] The subject parcel was zoned R-3 for multi-family housing pursuant to the master plan for the property.

In 1983, planning began for an apartment project in the foothills. After numerous meetings with City staff, an application for review of plans was submitted to the City on May 30, 1986. The application was considered a development application. A former planning director testified that the City's policy was to review development applications under the procedures in effect at the time the plans were submitted. This policy was stated to Stubblefield a number of times. Development applications were reviewed by the Planning Department, including review

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other City officials. The trial lasted 10 weeks and produced a transcript approaching 5,000 pages.

[3] Of course, one mayor or city council cannot limit the exercise of the police power by future mayors or city councils. (*Delucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814, 823.)

by an Environmental Review Committee and the Development Review Committee. Final approval is by the Planning Commission and/or City Council.[4]

The city council member representing the area at the time was Steve Marks. Although originally a supporter of the project, he subsequently became a powerful opponent. Plaintiffs alleged that Councilman Marks orchestrated a number of actions in the Fall of 1986 to block the project. The City contended that Councilman Marks was merely reflecting the concerns of his constituents, many of whom testified against the project.

A revision of the City's R-3 multi-family housing zoning ordinance was pending at that time. The revised multi-family housing zoning ordinance was adopted on October 22, 1986. It potentially affected Stubblefield's project in two respects. First, it limited the height of apartments to two stories on the perimeter of the project. Second, it required a conditional use permit for any project which did not comply with the new ordinance. If the new ordinance were applied to the Stubblefield project, which contemplated three-story units, the project would require a conditional use permit. There was testimony that these requirements were aimed at the Stubblefield

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[4] The former planning director testified that the planning department approval process was ministerial rather than discretionary. He also testified that Stubblefield met all the requirements of the review of plans process. From this testimony, plaintiffs argue that they had a right to have their application approved. However, the witness conceded that some parts of the approval process, such as whether an EIR would be required, were discretionary.

project. However, Mr. Stubblefield was assured that the new ordinance would not apply to his project.

Since revision of the zoning ordinance would not affect the Stubblefield project under the City's existing approval policy (i.e., that development plans were reviewed under the rules in effect at the time of application, rather than the time of approval), Councilman Marks proposed an urgency ordinance to change the policy. The urgency ordinance was adopted on October 20, 1986. It provided that the revised R-3 ordinance would apply to "all projects for which plans have not been approved by the Development Review Committee as of thirty days following date of adoption of this section."[5] No justification for an urgency ordinance existed, except the desire to block approval of the Stubblefield project.

Stubblefield could still have received approval within the 30-day period. At that time, it had received approval from the Environmental Review Committee for using a negative declaration under the California Environmental Quality Act ("CEQA") on the project. However, Councilman Marks had previously sponsored an ordinance that allowed any person, not just the applicant, to appeal such

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[5] Former Councilman Strickler testified that the former policy was that a developer had a year from the filing of his application to meet the requirements of the zoning ordinance. The urgency ordinance reduced that period to 30 days. He thought the ordinance would have no effect on the Stubblefield project because he thought that project was grandfathered. He also thought the new guidelines would benefit developers.

a decision to the Planning Commission.[6] The ordinance passed on September 10, 1986, and Councilman Marks subsequently appealed the Environmental Review Committee's negative declaration decision to the Planning Commission. By this action, he delayed Design Review Committee approval of the Stubblefield project. The project was not approved within the requisite 30-day period.

On October 20, 1986, Councilman Marks engineered another amendment to the review of plans ordinance. Under the amendment, the proposed buildings had to be compatible with the surrounding neighborhood. This amendment was also aimed at the Stubblefield project.

The Planning Commission agreed with the Environmental Review Committee that a negative declaration was appropriate. Objecting homeowners in the neighborhood appealed that decision to the City Council. On November 17, 1986, a City Council meeting was held at Sturgess Auditorium to consider the appeal. A lengthy public hearing heard presentations by the homeowners, their attorney, and various experts about the potential environmental effects of the project. At the conclusion of the hearing, the City Council voted, 4-3, to require a focused environmental impact report for the project. A number of persons present at that meeting testified at trial concerning events of the meeting. The effect of the requirement for a focused EIR was to prevent Stubblefield's review of plans application from being

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[6] Former Councilman Strickler testified that he thought the ordinance was redundant because he understood that any councilman could bring a matter that was before a committee to the full council at any time without filing a formal appeal.

approved before the new multi-family zoning ordinance took effect.

Stubblefield accepted the City Council's decision and intended to prepare an environmental impact report. The City notified Stubblefield that it would require an environmental impact report and resubmission for a conditional use permit. Since a conditional use permit is discretionary and could be denied by the City Council, Stubblefield was not willing to risk denial after paying for an environmental impact report. Stubblefield also thought a report was not feasible until the City determined whether it would allow three-story apartment buildings on the project. Accordingly, no environmental impact report was ever prepared, and no conditional use permit application was submitted.[7]

Instead, Stubblefield requested the City Council to grandfather its project so that it could proceed under the requirements of the prior ordinance. The City Council referred the question to the Legislative Review Committee. The Legislative Review Committee delayed action on the request until early 1987. The Committee asked the City Attorney and the Planning Director to review and analyze the City's position for the Committee.

Five new council members were elected in March 1987. The Planning Director and City Attorney left and

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[7] Mr. Stubblefield testified that he was faced with three choices at the time: (1) to redesign the project to comply with the new ordinance; (2) to prepare the EIR, submit the conditional use permit application, and hope for discretionary approval of the project; or (3) to pursue the grandfathering application. He elected the latter option.

their positions were vacant for several months. No action was taken on Stubblefield's grandfathering request, and the opinions of the City Attorney and Planning Director were not forthcoming.

In March 1987, an unrelated lawsuit was filed challenging the adequacy of the City's general plan. As a result of that lawsuit, a moratorium on development was imposed by the court. The City Council passed an ordinance to implement the moratorium. The moratorium was under the supervision of the California Office of Planning and Research ("OPR"). The former director of OPR testified as to the meaning and effect of the moratorium. Plaintiffs alleged that the City applied the moratorium to include the Stubblefield property, and used the moratorium as an excuse not to take any further action on Stubblefield's grandfathering request, or on the project itself. The City took no action on Stubblefield's request to obtain clarification of the moratorium provisions from OPR. The moratorium was in effect for two years.

A staff report prepared by the new planning director on September 8, 1987, for the City Council reviewed the grandfathering request in some detail and recommended denial of the request. The Council subsequently referred the matter to the Legislative Review Committee for a second time.

Stubblefield was not told that action on its grandfathering request was tabled, but was notified by the new planning director that its development application could not be processed further until a new general plan was adopted.

On January 19, 1988, the City Council held a hearing on Stubblefield's application to grandfather its project. Despite an invitation to present argument in support of its application at that hearing, Stubblefield's request to speak was summarily denied on grounds that the hearing was not a public hearing. The Council then voted to deny approval of grandfathering.

The *Stubblefield I* complaint was filed on April 18, 1988. On June 2, 1989, a new general plan was adopted. Plaintiffs contend that it effectively prevented all development of the subject property. Damages were awarded on this basis.

ISSUES

1. Issues Raised by the City.

The City's primary contention is that its motion for judgment notwithstanding the verdict should have been granted because there was insufficient evidence to support a judgment for plaintiffs on either an equal protection or substantive due process theory.

In its cross-appeal, the City contends that a new trial should have been granted on all issues because of errors in the jury instructions and special verdict form, for juror misconduct, and for errors in the admission and exclusion of evidence.

The City also challenges the interim award of attorney fees to plaintiffs on grounds that plaintiffs have not achieved any success on the merits due to the granting of the new trial motion on the issue of damages.

2. Issues Raised by Plaintiffs.

Plaintiffs challenge the trial court's order granting a new trial on the issue of damages and seek to preserve the jury's finding of over 11.5 million dollars in damages.

3. Issue Raised by this Court.

In a letter dated September 16, 1994, this court requested the parties to comment on the applicability of *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 and the one final judgment rule to this case. The parties submitted letter briefs on that subject, and we consider that issue first.

APPEALABILITY

In *Morehart v. County of Santa Barbara, supra,* 7 Cal.4th 725, our Supreme Court considered and rejected the holding of *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401 that a final judgment resulted when a cause of action was properly severed, even though other causes of action remained to be tried. (*Id.*, at pp. 418-419.)

Morehart held that "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara, supra,* 7 Cal.4th 725, 743.)

In applying *Morehart* here, we must first determine whether all of the causes of action between the parties include all causes of action alleged in *Stubblefield I* and

Stubblefield II. In other words, we must consider the effect of the order consolidating *Stubblefield I* and *Stubblefield II* for trial.

1. Effect of Consolidation Order.

Code of Civil Procedure, section 1048, subdivision (a), provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Consolidation may be for all purposes, or for purpose of trial only: "Ordinarily, consolidated actions may be determined by a single set of findings and a single judgment – 'the allegations of the various complaints may be taken together and treated as one pleading' [citation] and 'for the purposes of all further proceedings, the cases are to be treated as if the causes had been united originally' [citation]. But a different situation exists where pending actions are consolidated only for the purpose of trial of related issues. In such event the evidence presented in one case is to be deemed applicable in the other insofar as it is relevant thereto, but separate findings and judgments must be made in each case in disposition of the particular issues as independently submitted." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 721-722.)

Here, plaintiffs' consolidation motion requested that the two cases be consolidated for trial. The motion was granted and the consolidation order specified that the

consolidation was for trial only. Separate findings and judgments were therefore required in each case.

2. Effect of Separate Trial of Civil Rights Cause of Action.

Stubblefield I alleged eleven causes of action. The eighth, deprivation of civil rights under 42 U.S.C.A. section 1983, was tried to the jury. Of the remaining causes of action, six were dismissed before trial and four were dismissed after trial. In addition, the City filed a cross-complaint in *Stubblefield I*. The record does not reflect the disposition of the cross-complaint.[8]

Stubblefield II alleged eight causes of action. The seventh cause of action alleged that the City's General Plan, adopted after the events in *Stubblefield I*, imposed a Hillside Management Overlay District that affected the value of all of plaintiffs' property in that District, including the apartment house site at issue in *Stubblefield I*. Plaintiffs seek 44 million dollars in damages in *Stubblefield II*.

Originally, the seventh cause of action was ordered tried with the eighth cause of action in *Stubblefield I*

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[8] Normally, the existence of an unresolved cross-complaint will defeat appealability under the one final judgment rule because it leaves unresolved issues between the parties. (1 Eisenberg, Cal. Practice Guide, Civil Appeals & Writs (1994) § 2:70, pp. 2-33 to 2-34.) However, it appears that the cross-complaint here was tried with the cause of action submitted to the jury, was necessarily abandoned or decided adversely to the City, and was inadvertently omitted from the judgment. In these circumstances, the technical presence of a cross-complaint does not violate the one final judgment rule. (*Ibid.*)

"insofar as [the seventh cause of action] relates to the damages suffered by plaintiff for any violation of the due process or of the civil rights under 1983. . . . " Subsequently, the trial court denied a motion to reconsider this ruling and said: "[T]he plaintiff will not be permitted to offer any evidence whatsoever on any of the causes of action of *Stubblefield II* to the jury. [¶] The plaintiff will be permitted to indicate to the jury the ultimate effect of the delay and the adoption of the General Plan, but will not be permitted to attack in any degree by innuendo or any other way the propriety of the General Plan or the H.M.O.D." By stipulation and court order, the remaining causes of action in *Stubblefield II* were to be tried by the court upon conclusion of the jury trial.

From the foregoing, we conclude that (1) the judgment in *Stubblefield I* is a final judgment, and that the appeals related to that judgment do not violate *Morehart* or the one final judgment rule; and (2) no part of *Stubblefield II* has been tried, and the issues in that case are not before us in this appeal.[9]

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[9] In their letter briefs, the parties agree that *Morehart* is inapplicable and that this appeal of *Stubblefield I* should be decided on its merits.

The parties also agree that no part of *Stubblefield II* has been tried. The City contends that the trial court allowed plaintiffs to try their damages claims from *Stubblefield II* during *Stubblefield I* without first establishing liability and that the trial court subsequently realized its error when it granted a new trial on damages. Nevertheless, the City agrees that *Stubblefield II* has not been tried.

Since plaintiffs' damages claim in *Stubblefield II* is based on the theory that its property was rendered valueless by the adoption of the Hillside Management Overlay District, interesting

I. CITY'S APPEAL OF JUDGMENT NOTWITHSTANDING THE VERDICT STANDARD OF REVIEW – JNOV

The City's appeal from the trial court's denial of the City's motion for judgment notwithstanding the verdict is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision. The standard of review is essentially the same as when the trial court has granted the motion.

" 'In making the order granting the motion for judgment notwithstanding the verdict, the trial court may not weigh the evidence or judge the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict. [¶] 'On an appeal from the judgment for defendant notwithstanding the verdict, the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict. . . . ' " (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 151-152, quoting *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 690, overruled on another grounds in *Egan v. Mutual of Omaha Ins. Co.*

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appealability and consolidation issues would have been raised if the trial court had not granted a new trial on the damages issue.

(1979) 24 Cal.3d 809, 822, fn. 5.) Accordingly, we determine whether there is substantial evidence to support the jury's conclusions and the trial court's decision, i.e., whether plaintiffs proved every element of their cause of action. (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743-744; *Sprigg v. Garcin* (1980) 105 Cal.App.3d 869, 873.)

Before reviewing the question of whether there was substantial evidence to support the jury's verdict and the trial court's decision, we consider the general principles of plaintiffs' cause of action for deprivation of its civil rights.

GENERAL PRINCIPLES OF CIVIL RIGHTS ACTIONS AND DUE PROCESS

The civil rights statute provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " (42 U.S.C.A. § 1983.)

The essential elements of a cause of action are, therefore, (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. (*Parratt v. Taylor* (1981) 451 U.S. 527,

535, overruled on another ground in *Daniels v. Williams* (1986) 474 U.S. 327.)

The use of section 1983 in the land use context dates from *Monell v. Dept. of Soc. Serv. of City of N. Y.* (1978) 436 U.S. 658. In that case, the Supreme Court overruled an earlier case that had held that local governments were wholly immune from suit under section 1983. (*Id.*, at p. 663.) The court reviewed the legislative history and concluded that Congress intended to include municipal government units to be included among the persons to whom section 1983 applies. (*Id.*, at p. 690.) The court therefore held that local governing bodies can be sued for damages where the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Ibid.*) The decision also allowed suits for deprivations resulting from the custom of local governments, even if the custom had not been formally approved by the governing body. (*Id.*, at pp. 690-691.)

Subsequently, in *Owen v. City of Independence, Mo.* (1980) 445 U.S. 622, the Supreme Court reviewed a suit by a dismissed chief of police and held that the good faith of city officials did not give the municipality a qualified immunity from suit under section 1983. (*Id.*, at p. 638.) Thus the municipality itself had no immunity from damages flowing from its constitutional violations of the rights of individual citizens. (*Id.*, at p. 657.)

In *Parratt v. Taylor, supra,* 451 U.S. 527, the court held that, although prison officials there clearly acted under color of state law, the deprivation element was not satisfied because postdeprivation remedies under state law

were adequate to satisfy due process. Specifically, the tort claims procedure of the state provided such a remedy for the prisoner who had suffered a tortious loss of his property. (*Id.*, at p. 543.) Accordingly, there was no violation of the due process clause, and no violation of section 1983.

Similarly, in *Hudson v. Palmer* (1984) 468 U.S. 517, the court extended the principle to include cases in which deprivation resulted from intentional state actions which deprived a prisoner of his property.

The Supreme Court applied these principles in a land use case in which the developer sued under section 1983 and argued that the Planning Commission had taken his property without paying just compensation. The Supreme Court held the claim premature. (*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172.) The court said that resolution of the due process issue "depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations." (*Id.*, at p. 200.)

In addition, the Second Circuit has held that denial of a request for zoning relief does not involve denial of a protected property right. (*Yale Auto Parts, Inc. v. Johnson* (2d Cir. 1985) 758 F.2d 54.) The First Circuit has also

declined to find a due process violation in the ordinary type of dispute between a developer and a local planning agency. (*Creative Environments, Inc. v. Estabrook* (1st Cir. 1982) 680 F.2d 822, 833.)

Lower federal courts have also applied an abstention doctrine to refrain from turning local land use disputes into federal civil rights claims. (E.g., *C-Y Development Co. v. City of Redlands* (9th Cir. 1983) 703 F.2d 375.)

SUBSTANTIAL EVIDENCE ISSUES

The parties here stipulated that the officials here were acting under color of law, and that they acted intentionally. The first element of the cause of action was therefore satisfied. The issue thus becomes a question of whether Stubblefield was deprived of a federal constitutional right, i.e., the right to substantive due process and/or the right to equal protection of law.

The City argues that the trial court erred in failing to determine certain legal issues which relate to these questions.[10]

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[10] We do not reach the issues of the scope of the issues submitted to the jury, and whether the special verdict form was defective. We note, however, on the first question, that the federal authorities cited by plaintiffs are inapplicable because the Seventh Amendment right to trial by jury does not apply to the states. (See, generally, 1 Schwartz, Section 1983 Litigation (2d ed. 1991) § 16.2, p. 838.)

In addition, several of the issues presented are pure issues of law for the court's determination. Plaintiffs argued that the jury should decide the ultimate issue of whether the City's actions were irrational or arbitrary, but the issue was not submitted to the jury. However, the trial court instructed the jury

With regard to substantive due process, the City first argues that the trial court erred in failing to initially determine whether plaintiffs had a property right protected by the due process clause, i.e., whether plaintiffs had a vested right to develop their property. If the trial court had considered and made this determination, the City contends that it would have found that no property right existed, and that there was insufficient evidence to submit the issue to the jury.

Secondly, the City argues that there was no deprivation of substantive due process rights because Stubblefield failed to prove a substantive due process violation as a matter of law. The City contends that the trial court failed to determine that there was sufficient evidence of such a violation to submit the issue to the

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that it would determine whether Stubblefield's civil rights had been violated "based upon [the jury's] determination of these factual issues." The record does not disclose either the basis for the trial court's decision to decide the civil rights issue itself or the trial court's ultimate decision or reasoning in that regard.

On the second question, the form of the verdict, it appears that, although the trial court decided to ask the jury for a special verdict on only the six questions quoted above, it also instructed the jury to decide whether plaintiffs' constitutional rights were violated.

Plaintiffs filed written objections to the court's apparent decision to itself decide whether the City violated plaintiffs' civil rights. The argument on the objections is not in our record.

The narrowness of the questions actually decided by the jury undercut the usual deference to be given to the jury's factual findings. We give no deference to the jury's findings to the extent that the jury purported to decide purely legal issues, and the deference given on factual matters is limited to the narrow questions the jury actually answered.

jury, and there was insufficient evidence as a matter of law.

With regard to equal protection, the City argues that the evidence was insufficient to support a cause of action because there was a rational basis for the actions taken. Under this heading, the City analyzes 20 instances of alleged discriminatory treatment and finds that they were either nonactionable, rationally related to a legitimate state interest, and/or barred by the statute of limitations.

SUBSTANTIVE DUE PROCESS – VESTED RIGHTS

The City's first argument is that plaintiffs had no vested rights to develop their property. Although the proposed use was in accordance with the existing zoning of the property, the City argues that plaintiffs had no right to a particular zoning or to a building permit.

The City cites *Board of Regents v. Roth* (1972) 408 U.S. 564. In that case, the Supreme Court held that an untenured teacher at a state university had no constitutional right to a statement of reasons and a hearing on the university's decision not to hire him for another year. Speaking generally, the Court said: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms. . . . [¶] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.*, at pp. 576-577.) Accordingly, the teacher was held not to have "a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." (*Id.*, at p. 578.)

The City thus frames the issue as to whether plaintiffs had a right to build apartments on their property under state law. It argues that no such right arose under California law. It cites *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785. In that case, our Supreme Court considered whether a developer had vested rights under California law. The court said: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citations.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." (*Id.*, at p. 791.) After discussing vested rights at common law, the court found that applicable precedent "stand[s] for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to

a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued." (*Id.*, at p. 793.) The court also suggested that other permits, such as a conditional use permit, might create a vested right if they gave substantially the same specificity and definition to a project as a building permit.[11] (*Id.*, at pp. 793-794.)

We find *Avco* persuasive and thus conclude that Stubblefield had no vested right to build any particular apartment buildings because it had not applied for or received a building permit for its project.[12] We also agree that, under *Avco*, plaintiffs here had no vested right to develop their property in accordance with the zoning in existence at the time they submitted their review of plans application. (Cf. *Seguin v. City of Sterling Heights* (6th Cir. 1992)

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[11] The significance of a building permit is that it is approval of a specific structure which complies with the law in effect at the time the permit is issued. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, 801.)

[12] *Avco* also rejects the argument, made here, that the developer was entitled to a building permit because the county would have had to issue one upon mere application. The Orange County Building Code codified "the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit." (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, 795.) Here, the review of plans process was never completed and building permits were not applied for.

968 F.2d 584, 591; *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.* (9th Cir. 1994) 24 F.3d 56, 62.)

SUBSTANTIVE DUE PROCESS – EVIDENCE OF VIOLATION

In response to the preceding argument, plaintiffs contend that they need not possess a vested right in order to argue their substantive due process claim because they have a due process right to be protected from arbitrary or irrational government actions, or legislative enactments which are not rationally and substantially related to a legitimate governmental interest.

The City contends that plaintiffs did not prove a substantive due process claim under any of the applicable authority.

For purposes of discussion in this section, we accept plaintiffs' premise and assume that plaintiffs did not have to have a vested right in order to assert substantive due process as a protection against irrational and arbitrary actions by the City.[13] "It is by now well established that

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[13] We note, however, that, in some of the cases cited by plaintiffs, a vested right exists by virtue of the ownership of the property itself. The deprivation of all or part of that ownership interest was the subject of a takings claim. (E.g., *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.) While a takings claim was also made here, the case was not tried on that cause of action.

The City also cites *Zorzi v. County of Putnam* (7th Cir. 1994) 30 F.3d 885, 894-895: "A claim based on substantive due process must be based on the deprivation of an underlying protected life, liberty or property interest. [Citations.] 'Accordingly, the absence of any claim by the plaintiff that an interest in liberty or

legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15.) We therefore consider the sufficiency of the evidence of a substantive due process violation arising from arbitrary or irrational actions.[14]

The City relies on *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28. In that case, the court considered rejection of a developer's construction permit. Under facts similar to those here, the court found no deprivation of procedural or substantive due process, or equal protection. In rejecting a substantive due process claim based on arbitrary action, the court said: "This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. [Citations.] Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. [Citation.] The doctrine of substantive due process 'does

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property has been impaired is a fatal defect in her substantive due process argument.' [Citation.] [¶] . . . [I]n the absence of a life, liberty or property interest Zorzi could be terminated for arbitrary and capricious reasons."

[14] Again we note that neither the trial court nor the jury made a specific finding that the City had acted irrationally or arbitrarily in its actions towards Stubblefield. The judgment only recites that, based on the jury's special verdict, the court finds an unspecified federal civil rights violation.

not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." ' [Citations.] PFZ's allegations concerning [the agency's] treatment of its proposal simply do not make out a substantive due process violation under this standard." (*Id.*, at pp. 31-32; see, also, *Chiplin Enterprises v. City of Lebanon* (1st Cir. 1983) 712 F.2d 1524; *Creative Environments, Inc. v. Estabrook, supra,* 680 F.2d 822.)[15]

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[15] At oral argument, Stubblefield's counsel argued that the First Circuit cases represent a minority view, out of step with other circuit courts.

All circuits agree that a substantive due process claim can be stated in some circumstances involving controversies similar to this one. Discussions of the differences between circuits in this regard are found in *Pearson v. City of Grand Blanc* (6th Cir. 1992) 961 F.2d 1211, 1217-1223, and *Littlefield v. City of Afton* (8th Cir. 1986) 785 F.2d 596, 604-607. The latter case supports plaintiffs by stating that the First Circuit is the only circuit that generally refuses to recognize substantive due process claims under section 1983. (*Id.*, at p. 604.)

However, the arbitrary or irrational standard applied here, and/or the First Circuit cases cited above, have been followed by the Second Circuit in *RRI Realty Corp. v. Inc. Village of Southampton* (2d Cir. 1989) 870 F.2d 911, 915, and *Sullivan v. Town of Salem* (2d Cir. 1986) 805 F.2d 81, 82; the Third Circuit in *Pace Resources, Inc. v. Shrewsbury Tp.* (3d Cir. 1987) 808 F.2d 1023, 1036; the Fourth Circuit in *Scott v. Greenville County* (4th Cir. 1983) 716 F.2d 1409, 1419, and *Gardner v. Baltimore Mayor & City Council* (4th Cir. 1992) 969 F.2d 63, 68; the Fifth Circuit in *Shelton v. City of College Station* (5th Cir. 1986) 780 F.2d 475, 482; the Sixth

We agree with this characterization of substantive due process in the land use context. "[P]laintiff has failed to identify any federally protected right of which it was deprived when the Board denied its development application. [¶] . . . [F]ederal courts do not sit as a super zoning board or a zoning board of appeals." (*Arroyo Vista Partners v. County of Santa Barbara* (C.D. Cal. 1990) 732 F.Supp. 1046, 1051.)

More fundamentally, we agree with the City's contention that the facts proven here simply do not rise to the level of a substantive due process violation.

In our view, plaintiffs have not, as a matter of law, shown arbitrary or irrational government action. Rather, the record demonstrates actions of the City Council that responded to concerns of constituents in the affected area and other political concerns. Specifically, the alleged vendetta of Councilman Marks against the project has not been shown to be an arbitrary and irrational action as a matter of substantive due process. It is not uncommon or unusual for a legislator to oppose a project and to use all

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Circuit in *Pearson v. City of Grand Blanc, supra,* 961 F.2d 1211, 1217-1223; the Seventh Circuit in *Albery v. Reddig* (7th Cir. 1983) 718 F.2d 245, 249, 251, and *Curto v. City of Harper Woods* (6th Cir. 1992) 954 F.2d 1237; the Eighth Circuit in *Chesterfield Dev. v. City of Chesterfield* (8th Cir. 1992) 963 F.2d 1102, 1104, and *Littlefield v. City of Afton, supra,* 785 F.2d 596, 604-607; and the Ninth Circuit in *Southern Pacific v. City of Los Angeles* (9th Cir. 1990) 922 F.2d 498, 507.

See, also, *Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1286-1288. For further discussion of differences between circuits in the section 1983 land use litigation context, see 1 Schwartz & Kirklin, Section 1983 Litigation (2d ed. 1991) section 3.14, pages 213-219.

means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her constituents, and there is ample evidence in the record here that persons living in the vicinity of the project were concerned about it. Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously. "The opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions." (*Nelson v. City of Selma* (9th Cir. 1989) 881 F.2d 836, 840.)

The actions of the City Council were also proper. A legislative body is generally not bound by the actions of its predecessors. Accordingly, it may amend zoning, general plan, and other provisions applicable to a property without incurring liability.[16] While arbitrary zoning actions directed at a specific property may be invalidated (*Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330), the actions taken here were general in nature. For example, the R-3 ordinance that was amended in October 1986, applied to all multi-family housing units in the City. The moratorium imposed as a result of the unrelated lawsuit affected all foothill properties and 40 or 50 proposed projects north of a certain line. The City's refusal to allow the project to be grandfathered resulted in the project being subject to the same rules as all other properties covered by the revised R-3 ordinance. In short, we find a rational basis for the City's actions. (*Greenbriar, Ltd. v. City of Alabaster, supra,* 881 F.2d 1570, 1577; *Arroyo*

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[16] As noted above, the inverse condemnation causes of action in *Stubblefield I* were not tried.

Vista Partners v. County of Santa Barbara, supra, 732 F.Supp. 1046, 1054.)

In *Jackson Court Condominiums v. City of New Orleans* (5th Cir. 1989) 874 F.2d 1070, 1077, the court said: " 'We hold that the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis.' [Citation.] The key to such an inquiry is whether the question is 'at least debatable.' [Citation.] Those challenging a legislative decision 'must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " Accordingly, the court upheld an interim moratorium on time share developments in residential areas because the question was one of legitimate and debatable concern.

More generally, we agree with *Creative Environments, Inc. v. Estabrook, supra,* 680 F.2d 822: "Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when Bolton's Planning Board, for the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design. [¶] Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of CEI's characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an

admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less 'distort' the state scheme under which they operate. . . . It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983. As has been often stated, '[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.' [Citations.] In short, we see nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. CEI may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court." (*Id.*, at pp. 832-833, fns. omitted.)

In this case, the state law remedies are also adequate. We are reluctant to minutely scrutinize the legislative processes of the City in the manner proposed by plaintiffs. It is sufficient that those processes are rational, and not arbitrary or irrational. "If we find that the rational relation of the zoning actions to legitimate governmental interests is at least fairly debatable, the action must be upheld." (*Nelson v. City of Selma, supra,* 881 F.2d 836, 839.)

We so find. This is an ordinary dispute between a developer and a municipality and we conclude that the claims asserted simply do not qualify as deprivations of substantive due process. (*Greenbriar, Ltd. v. City of Alabaster, supra,* 881 F.2d 1570, 1579-1580; *Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1234, 1238.)

EQUAL PROTECTION – RATIONAL BASIS

The City relies on the general principle stated in *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 457-458: "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose." Under this test, a statute will be upheld if it bears a rational relation to a legitimate government objective. Specifically, the court said: "Social and economic legislation like the statute at issue in this case, moreover, 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.' [Citations.] '[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' [Citation.] In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' [Citation.]" (*Id.*, at pp. 462-463.)

In the land use context, the City cites *Greene v. Town of Blooming Grove* (2d Cir. 1989) 879 F.2d 1061. In that case a zoning classification was challenged under section 1983. In rejecting an equal protection argument, the court held

that the zoning district was rationally related to legitimate state interests. The court said: "Generally a municipal zoning ordinance is presumed [to] be valid [citation], and will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." (*Id.*, at p. 1063.)

In our view, there was nothing arbitrary or unreasonable in the zoning actions taken here. The revised R-3 multi-family zoning ordinance applied to all multi-family housing in the City. The urgency ordinance applied to all development applications pending at the time it was adopted. The moratorium ordinance applied to all foothill property north of a specified line. The general plan revisions affected all property in the City, while the hillside provisions were based on the slope percentages. These were all rational classifications.[17]

Plaintiffs argued that their property was unique and failed to show that they were treated differently from other landowners similarly situated. (*Madarang v. Bermudes* (9th Cir. 1989) 889 F.2d 251, 253; *Craft v. Wipf* (8th Cir. 1987) 836 F.2d 412, 418; *Yale Auto Parts, Inc. v. Johnson, supra,* 758 F.2d 54, 61.) "In order to prevail, the [plaintiff] must make a showing that a class that is similarly situated has been treated disparately." (*Christian Gospel Church v. San Francisco* (9th Cir. 1990) 896 F.2d 1221, 1225.)

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[17] Nothing in this opinion determines the issues as to the validity of the General Plan amendments which imposed the limitations on hillside construction. These issues, including inverse condemnation issues, are still pending in *Stubblefield II.*

The City also cites *Trafford v. Penno* (D.R.I. 1992) 800 F.Supp. 1052, 1057: "Proving an actual deprivation of equal protection rights in a dispute between a developer and a town planning agency is a daunting task. First, Plaintiff must prove that he was actually treated differently than other developers similarly situated. Absent proof of differing treatment, an equal protection claim must fail."

As noted above, plaintiffs asserted some 13 instances of allegedly discriminatory treatment. Having reviewed the cited instances, we find them insufficient to support a denial of equal protection claim.[18] While it may fairly be said that certain actions of the City Council, specifically including certain actions of Councilman Marks, were taken with the Stubblefield project in mind, and were taken for the purpose of blocking the project, the motive of the legislators is generally irrelevant.[19] (*Hancock Industries v. Schaeffer* (3d Cir. 1987)

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[18] In the original complaint, plaintiffs alleged, as the basis for their equal protection claim, that the City's actions were based on discrimination "based on socio-economic status and on the basis of racial or ethnic origins of the prospective tenants." These allegations were not proven at trial. The application defined the project as an upscale multi-family community. Mr. Stubblefield testified that the project would be a high rent apartment project but, because of requirements of project financing, 20 percent of the apartments would be set aside for low and moderate income families.

[19] Without adopting the City's reasoning on the specific instances cited by plaintiff, we note that a number of the actions were initiated or taken by Councilman Marks in his efforts to oppose the project. We find nothing arbitrary or irrational in Councilman Mark's opposition to the project. Thus the facts that the City Council had a meeting on the project at Sturgis Auditorium, or that Councilman Marks mailed out letters to his

811 F.2d 225, 237.) As *Hancock* states: "If the legislative determination that its action will tend to serve a legitimate public purpose 'is at least debatable,' the challenge to that action must fail as a matter of law." (*Id.*, at p. 238.)

Thus, even if, as the jury found, the actions of the City were motivated by the purpose of intending to discriminate against Stubblefield, an equal protection claim has not been shown. "When there is insufficient evidence of racial discrimination, we review the City's actions to determine whether [plaintiffs'] property has been treated differently from similarly situated property and whether there is any rational basis for such treatment. [Citation.] [¶] [plaintiffs'] equal protection claim must fail because there is no evidence in the record that property similar to the [plaintiffs] was treated differently. Unfortunately for the [plaintiffs], it may be impossible to provide this evidence, as the [plaintiffs'] land . . . [is] in fact unique. . . . [¶] In the end, even if the [plaintiffs] were singled out for different treatment, the City has provided a rational explanation for why the general plan treats the [plaintiffs'] property as it does." (*Kawaoka v. City of Arroyo Grande, supra,* 17 F.3d 1227, 1240.)

None of the actions taken by the City Council, on their face, applied to this project alone. The regulation of foothill property, including the apartment projects proposed here, is clearly a legitimate public purpose. This is

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constituents opposing the project are constitutionally insignificant, even if the City Council had not previously held such a meeting, and even if Councilman Marks had never sent out letters opposing any other project. Such activities merely represent the democratic process at work.

particularly true in this case, since the environmental questions raised by opponents of the project have never been answered. Zoning regulation of multi-family apartment units is unquestionably a legitimate public purpose. The classifications adopted by the City Council were clearly related to that purpose and we find no substantial basis for plaintiffs' equal protection challenge.

OTHER APPEALS AND ISSUES

In view of our decision that the City's motion for judgment notwithstanding the verdict should have been granted, we need not discuss the other issues. Since plaintiffs are not the prevailing parties, the order granting interim attorney fees to plaintiffs must also be reversed.

DISPOSITION

The judgment is reversed. The order dated June 10, 1991, denying the City's motion for judgment notwithstanding the verdict is reversed. The order granting interim attorney fees to plaintiffs, filed August 19, 1991, is reversed.

Plaintiffs' notice of appeal filed July 9, 1991, and Plaintiffs' notice of cross-appeal dated July 29, 1991, are dismissed as moot.

Each party is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

/s/ HOLLENHORST
J.

We concur:

/s/ DABNEY
Acting P.J.

/s/ RICHLI
J.

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO., et al., Plaintiffs and Appellants, v. CITY OF SAN BERNARDINO, Defendant and Respondent. [AND RELATED CROSS-APPEALS]	E009749 (consol. with E010088) (Super.Ct.Nos. 242998 and 252058) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING AND CERTIFYING OPINION FOR PUBLICATION (Filed Feb. 23, 1995)

The opinion filed in this case on January 27, 1995, is modified as follows:

On page 3, footnote 1, the following citation should read as follows:

" . . . Sinaloa Lake Owners Ass'n v. City of Simi Valley (9th Cir. 1989) 882 F.2d 1398, 1407-1409, cert. den. 494 U.S. 1016. . . . "

On page 26, the following citation should read as follows: "*PFZ Properties. Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28, cert. granted, 112 S.Ct. 41, cert. dismissed, 112 S.Ct. 1151."

A request having been made to this Court pursuant to rule 978 of the California Rules of Court for publication of the nonpublished opinion heretofore filed in the above-entitled matter and it appearing that the opinion meets the standard for publication as specified in rule 976 of the Rules of Court,

IT IS ORDERED that said opinion be certified for publication pursuant to rule 976.

Except for these modifications, the opinion previously filed remains unchanged.

The petition for rehearing is denied.

HOLLENHORST
J.

We concur:

DABNEY
Acting P.J.

RICHLI
J.

Fourth Appellate District, Division Two, No. E009749
S045308

IN THE SUPREME COURT OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO. Et Al., Appellants

v.

CITY OF SAN BERNARDINO, Respondent

And Companion Cases

(Filed Apr. 20, 1995)

Appellants' petition for review DENIED.

Arabian, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

HILL, FARRER & BURRILL
DARLENE F. PHILLIPS [81880]
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

STUBBLEFIELD CONSTRUCTION COMPANY, etc., et al., Petitioners and Plaintiffs, vs. CITY OF SAN BERNARDINO, et al., Respondents and Defendants.	CASE NO. 24 29 98 JUDGMENT ON SPECIAL VERDICTS FOR PLAINTIFFS (Filed Apr. 10, 1991)

This action came on regularly for trial by jury on January 30, 1991, with plaintiffs Stubblefield Construction Company and Stubblefield Properties appearing by their attorneys Hill, Farrer & Burrill and Darlene Fischer Phillips, and defendants City of San Bernardino, Common Council of the City of San Bernardino, Evlyn Wilcox, Mayor, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, and Norine Miller, as members of the Common Council, Planning

Commission of the City of San Bernardino, and Steve Marks appearing by their attorneys James F. Penman, City Attorney, and Henry Empeno, Jr., Deputy City Attorney; a jury of twelve persons was duly impaneled and sworn; witnesses testified; on March 5, 1991, the court, on the motion of plaintiffs, ordered the dismissal of defendants Common Council of the City of San Bernardino, Evlyn Wilcox, Mayor, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, and Norine Miller, as members of the Common Council, and Planning Commission of the City of San Bernardino; further on March 5, 1991, the court granted the defendants' Motion for Non-Suit as to Steve Marks only; further witnesses testified; and after being duly instructed by the court, the jury deliberated and thereon duly returned the following special verdicts:

PART I: STUBBLEFIELD'S CLAIM AGAINST DEFENDANT CITY OF SAN BERNARDINO REGARDING DENIAL OF SUBSTANTIVE DUE PROCESS IN VIOLATION OF 42 U.S.C. SECTION 1983

1. Were all of the City's actions regarding the Stubblefield's apartment project performed for a purpose which was substantially related to the public health, safety, morals or general welfare?

YES _ NO X

If you answered "YES" to Question 1, please go to Part II. If you answered "NO" to Question 1, please answer the next question.

2. Was Stubblefield damaged as a result of any of the City's actions regarding the Stubblefield's apartment project?

YES X NO _

If you answered "YES" to Question 2, please answer the next question. If you answered "NO" to Question 2, please go to Part II.

3. What was the total amount of Stubblefield's damages which were caused by the City's actions?

ANSWER $11,537,000

PART II: STUBBLEFIELD'S CLAIM AGAINST DEFENDANT CITY OF SAN BERNARDINO REGARDING DENIAL OF EQUAL PROTECTION IN VIOLATION OF 42 U.S.C. SECTION 1983

1. Were the City's actions regarding the Stubblefield's apartment project motivated with a purpose of intending to discriminate against Stubblefield?

YES X NO _

If you answered "YES" to Question 1, please answer the next question. If you answered "NO" to Question 1, please date and sign this Special Verdict Form.

2. Were the City's actions regarding the Stubblefield's apartment project substantially related to a legitimate governmental interest?

YES _ NO X

If you answered "YES" to Question 2, please date and sign this Special Verdict Form. If you answered "NO" to Question 2, please answer the next question.

3. Was Stubblefield damaged as a result of the City's actions regarding the Stubblefield's apartment project?

YES X NO _

If you answered "YES" to Question 3, please answer the next question. If you answered "NO" to Question 3, please date and sign this Special Verdict Form.

4. What was the total amount of Stubblefield's damages which were caused by the City's actions?

ANSWER $11,537,000

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, based on the foregoing Special Verdicts, that defendant City of San Bernardino has violated the federal civil rights of plaintiffs Stubblefield Construction Company and Stubblefield Properties and that plaintiffs shall recover from defendant City of San Bernardino the sum of $11,537,000.00 in damages together with interest thereon at the legal rate from the date of the verdict until paid, together with costs and disbursements in the amount of $___.

DATED: 4-10-91

/s/ Don A. Turner
DON A. TURNER
Judge of the Superior Court

EXCERPTS FROM REPORTERS' TRANSCRIPT ON APPEAL

TESTIMONY OF FRANK ARNOLD SCHUMA, FORMER PLANNING DIRECTOR OF THE CITY OF SAN BERNARDINO, CALLED AS AN ADVERSE WITNESS UNDER CALIFORNIA EVIDENCE CODE § 776 AND SWORN, FEBRUARY 6, 1991

Reporters' Transcript On Appeal at 1171-72

Q WHEN YOU WERE PLANNING DIRECTOR FOR THE CITY OF SAN BERNARDINO, WHAT WAS THE FUNCTION OF THE DEVELOPMENT REVIEW COMMITTEE?

A THE COMMITTEE WAS PRIMARILY RESPONSIBLE FOR REVIEWING AND APPROVING APPLICATIONS THAT COMPLIED WITH THE VARIOUS ORDINANCES OF THE CITY.

IT WAS REFERRED TO AS REVIEW OF PLANS PROCESS.

REVIEW OF PLANS WAS THE NAME OF THE APPLICATION.

AND WHEN A PROJECT CONFORMED TO ALL OF THE ZONING REQUIREMENTS OF THE CITY, THAT MEANT THAT THE PROJECT CONFORMED TO THE ZONING CLASSIFICATION.

IT CONFORMED TO ALL THE BUILDING SETBACKS, THE HEIGHT OF THE BUILDINGS, THE PARKING REQUIREMENTS, LANDSCAPING REQUIREMENTS, TRASH ENCLOSURES.

EVERYTHING COMPLIED WITH THE STANDARDS THAT WERE ESTABLISHED BY THE CITY.

THEN WE REVIEWED THEM. AND ON A PERIODIC BASIS, APPROVED THOSE TYPES OF APPLICATIONS ADMINISTRATIVELY.

THERE WAS NO DISCRETIONARY FUNCTION IN THAT RULE.

IT WAS JUST A STRAIGHT CUT AND DRY REVIEW AND APPROVE.

Reporters' Transcript on Appeal at 1185-86

Q NOW, IF A DEVELOPMENT PROJECT, A REVIEW OF PLANS PROJECT THAT WAS SUBMITTED TO YOUR DEPARTMENT MET ALL OF THESE FINDINGS, WAS THAT PROJECT APPROVED?

A YES.

Q ARE YOU GENERALLY FAMILIAR WITH THE TERMS MINISTERIAL AND DISCRETIONARY AS THEY APPLIED TO PLANNING PROCEDURES?

A GENERALLY.

Q WOULD YOU PLEASE EXPLAIN THE DIFFERENCES BETWEEN THOSE TWO THINGS?

A A MINISTERIAL ACT IS THAT PROCESS WHICH IS – ISSUES SUCH AS THE REVIEW OF PLANS WHERE THERE'S NO DISCRETIONARY AUTHORITY BEING GIVEN TO THIS – THE STAFF.

IN THIS CASE, THERE'S NO INTERJECTION OF THOUGHT RELATIVE TO THE APPROVAL OR DENIAL OF THE PROJECT.

IT MEETS THE STANDARDS, THEREFORE IT HAS TO BE APPROVED.

Q AND THAT'S MINISTERIAL?

A THAT'S A MINISTERIAL PROJECT.

Q WHAT IS DISCRETIONARY?

A DISCRETIONARY IS – ARE THOSE PROJECTS THAT HAVE TO GO BEFORE THE PLANNING COMMISSION AND/OR THE CITY COUNCIL WHERE THE COMMISSION AND THE CITY COUNCIL HAVE SOME DEGREE OF LATITUDE TO GO BACK AND MAKE CHANGES ON THE PROJECT.

THEY CAN ADD CERTAIN CONDITIONS. THEY CAN MAKE MODIFICATIONS TO THE PLANS THEMSELVES.

AND THEY ARE GIVEN – THEY ARE GIVEN A LOT MORE DISCRETION TO COME UP WITH THE PROJECT THAT WOULD BE MORE COMPATIBLE AND CONSISTENT IN THEIR OPINION WITH THE SURROUNDING AREA.

Q SO THE TERM DISCRETIONARY COMES FROM THE FACT THAT THEY HAVE MORE DISCRETION TO DENY A PROJECT?

A WELL, THE MINISTERIAL PROCESS, WE DID NOT HAVE THE ABILITY TO REALLY DENY A PROJECT, WHEREAS IN THE DISCRETIONARY PROJECTS, YOU DID HAVE THAT RIGHT TO DENY.

Q AND A REVIEW OF PLANS WAS WHICH TYPE OF ACTION?

A THAT WAS MINISTERIAL.

Reporters' Transcript On Appeal at 1252-53

IN MAY OF 1986, HOW DID THE CITY DETERMINE WHAT REGULATIONS WOULD GOVERN THE PROCESSING OF A REVIEW OF PLANS APPLICATION?

A THOSE REGULATIONS THAT WERE IN EFFECT AT THE TIME THAT THE PROJECT WAS SUBMITTED.

Q HOW LONG HAD THAT BEEN A POLICY OF THE CITY OF SAN BERNARDINO?

A I WAS FIRST EMPLOYED WITH THE CITY IN JANUARY OF 1981, AND TO MY RECOLLECTION IT WAS EVEN PRIOR TO MY EMPLOYMENT.

Q I'M SORRY. I DIDN'T HEAR THE LAST PART OF YOUR RESPONSE.

A IT WAS EVEN PRIOR TO MY EMPLOYMENT IN JANUARY OF 1981, TO THE BEST OF MY KNOWLEDGE.

Q WHEN YOU WENT TO WORK FOR THE CITY IN 1981, HOW DID YOU LEARN OF THAT POLICY?

A PRIMARILY THROUGH THE STAFF.

Q IN THE PLANNING DEPARTMENT?

A YES.

Q AND DURING YOUR TENURE AS PLANNING DIRECTOR, WAS THAT POLICY CONSISTENTLY APPLIED?

A YES.

Q UP TO THE FALL OF 1986, WERE YOU AWARE OF ANY EXCEPTION TO THAT POLICY?

A NO.

Q FROM THE TIME THAT THE REVIEW OF PLANS 86-51 WAS FILED, UP THROUGH THE FALL OF 1986, DID YOU TELL THE STUBBLEFIELDS THAT THEIR APPLICATION FOR THE REVIEW OF PLANS WOULD BE PROCESSED UNDER THE RULES AND REGULATIONS THAT WERE IN EFFECT WHEN THEY FILED IT?

A YES.

Q DID YOU TELL THEM THAT ON MORE THAN ONE OCCASION?

A YES.

Q IS IT FAIR TO SAY THAT YOU GAVE THEM ASSURANCES OF THAT?

A YES.

Reporters' Transcript On Appeal at 1280-81

Q NOW, THE STUBBLEFIELDS WERE NOT REQUIRED TO DO AN ENVIRONMENTAL IMPACT REPORT THOUGH UNDER THE REVIEW OF PLANS PROCESS; RIGHT?

A NO.

Q THAT'S YES, THEY WEREN'T?

A YES. THEY WERE NOT REQUIRED.

Reporters' Transcript On Appeal at 1294-95

Q MR. SCHUMA, JUST ONE FINAL QUESTION.

I DON'T BELIEVE I ASKED THIS THIS MORNING WHEN WE WERE TALKING ABOUT THE REVIEW OF PLANS PROCESS AND THE STUBBLEFIELD APPLICATION.

DID STUBBLEFIELD MEET ALL OF THE REQUIREMENTS OF THAT REVIEW OF PLANS PROCESS?

A YES.

Supreme Court, U.S.
FILED
SEP 19 1995
CLERK

No. 95-114

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Two

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BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-114

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

**On Petition for a Writ of Certiorari to the
Court of Appeal of California
Fourth Appellate District, Division Two**

BRIEF FOR RESPONDENT IN OPPOSITION

As recounted by the court below, the evidence in this case, viewed most favorably to petitioners, shows that their proposed building project helped to prompt the City of San Bernardino (respondent) to recognize the need for, and to adopt, revised citywide land-use regulations that would protect neighborhood-quality and environmental values threatened by projects like petitioners'. The City, moreover, refused to allow petitioners' building project (on which construction never began) to escape application of the new regulations by slipping in under the wire before the revised rules took effect. On these facts, petitioners in this case do not complain of any violation of state law, or of any procedural due process problem, or of any Takings Clause violation, or (at this stage of the case) of the absence of the legitimate rational basis required by the equal protection clause. Rather, they allege

a substantive due process violation. Their petition, however, suffers from a fundamental, dispositive defect: they do not attack the legal standard that the court below applied to reject their claim. For that simple reason, and because it is plain that no other jurisdiction would apply a higher standard or find a substantive due process violation in these circumstances, certiorari should be denied.

STATEMENT

1. Background

Petitioners own a parcel of undeveloped land in the foothills of the City of San Bernardino. The parcel was part of a larger area on which petitioners had been building homes since 1964. The parcel at issue was "zoned R-3 for multi-family housing pursuant to the master plan for the property." Pet. App. A6.[1]

At the end of May 1986, petitioners submitted to the City an application for review of their proposed plan to build an apartment complex on the parcel, with all the structures to be three stories. Pet. App. A6. At the time of the application, the City had under way a comprehensive review and revision of its R-3 zoning ordinance, prompted by "an explosion of apartments." RT 810, 1056, 2434-35; Pet. App. A7.[2] The review process for applications like petitioners' required several approvals, some ministerial and some discretionary, culminating in approval by the Planning Commission and/or the City Council through an appeal process. Pet. App. A6-A7 & n.4. The City's policy at the time of petitioners' applica-

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[1] The court below noted evidence that the area had been annexed to the City in 1968 with petitioners' consent and that some city officials at the time had provided assurances of "the zoning necessary to implement the master plan"—assurances, the court observed, that could not legally limit the future exercise of the police power by the City. Pet. App. A6 & n.3.

[2] "RT" refers to the reporter's transcript from the trial in this case. "JA" refers to the joint appendix in the Court of Appeal below.

tion was to review some "development applications under the procedures in effect at the time the plans were submitted." Pet. App. A6.[3]

The City adopted its revised R-3 zoning ordinance on October 22, 1986. The new citywide ordinance made numerous changes, one of which limited the height of apartment buildings to two stories on the perimeter of a project (allowing three stories on interior buildings), unless an exception was allowed by grant of a conditional use permit. Pet. App. A7; RT 837-38, 2431-32. And the City's law now declared that the new ordinance's standards would apply to any project that had not yet been approved by the Development Review Committee within 30 days of the ordinance's adoption, thus altering the previous City "effective date" policy. Pet. App. A8; *see* note 3, *supra*. More than 40 pending projects, as well as all future projects in the foothills and other areas of the City, were affected by the new measure. RT 3919-21, 4110-11, 4125-26.

Petitioners' project, which proposed three-story structures throughout the apartment complex, was covered by the new zoning measure because the requisite approvals had not been obtained. Pet. App. A8-A10.[4] In particular, petitioners' application was pending in an appeal, brought by City Councilman Marks, from an Environmental Review Committee decision that petitioners did not have to prepare an environmental impact report. Pet. App. A9. A further appeal to the City Council, brought by "[o]bjecting homeowners in the neighborhood," led to a lengthy public hearing on November 17, 1986. Pet. App. A9.

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[3] More precisely, as the Court of Appeal later noted, the standards that were in effect upon filing of an application were applied to the application *as long as* it was approved by the Development Review Committee within one year. Pet. App. A8 n.5.

[4] There was evidence that the City had petitioners' project in mind in changing its "effective date" policy for applying new zoning standards to not-yet-approved projects. Pet. App. A8.

After hearing "presentations by the homeowners, their attorney, and various experts about the potential environmental effects of the project," the City Council decided to require "a focused environmental impact report for the project." Pet. App. A9. The City also informed petitioners that, unless redesigned, the project would require "a conditional use permit due to the nonconformity with the new provisions of the R-3 ordinance; namely, the three story construction structures." Exhibit 13; RT 836-38; *see* Pet. App. A10.

Petitioners "accepted" the requirement of an environmental impact report, but they did not prepare one. Pet. App. A10. Nor did they seek a conditional use permit. Nor did they redesign their project to come within the rule limiting perimeter buildings to two stories. Rather, petitioners asked the City Council "to grandfather [their] project so that it could proceed under the requirements of the prior ordinance." Pet. App. A10; RT 838, 1849.[5]

That request was under review by the City (specifically, by the City Council's Legislative Review Committee, the Planning Director, and the City Attorney) when, in March 1987, a completely unrelated suit was brought in state court (by persons unconnected with this case) challenging the City's General Plan as outdated and contrary to state law. Pet. App. A11; JA 1590; RT 1088. The state court in that action imposed a moratorium on development, and the City responded by stopping all new construction and the processing of applications for construction until the suit was concluded. Pet. App. A11;

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[5] Petitioners said that they did this without first preparing the required environmental impact report because they did not want to incur the expense of preparing the report without knowing at the outset that the three-story project would be allowed. Pet. App. A10. Petitioners' testimony at trial showed that preparation of an environmental impact report—and petitioners "accepted" the duty to prepare one—would take "at least a year." RT 2632. As a result, it is ultimately immaterial to this case that the City reduced from one year to 30 days the time allowed for approval of a pre-ordinance application before the new standards took effect. *See* note 3, *supra*.

Exhibit 17; RT 867; Exhibit 43. In June 1987, the State's Office of Planning and Research likewise implemented the judicial moratorium by suspending all new development in the undeveloped portion of the City (such as petitioners' proposed project) until adoption of a revised General Plan. Pet. App. A11; Exhibit 18; RT 876, 3980-82.

Petitioners' request for an ordinance to grandfather their project was denied on January 19, 1988. Pet. App. A12; RT 885. Petitioners filed this lawsuit on April 18, 1988. Pet. App. A2; JA 1. This lawsuit is limited to challenging the actions taken by the City prior to that date.[6]

2. Proceedings Below

Petitioners' suit, brought in part under 42 U.S.C. § 1983, raised a host of claims, but only two went to trial: that the City's actions violated their substantive due process and equal protection rights. Pet. App. A3. As to the first constitutional claim, the trial court assigned to the jury the task of deciding whether "all of the City's actions regarding [petitioners'] apartment project [were] performed for a purpose which was substantially related to the public health, safety, morals or general welfare." Pet. App. A43. As to the second constitutional claim (which is not

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[6] On June 2, 1989, the City adopted its new General Plan. Pet. App. A12; RT 2462. The new General Plan rezoned the foothills, including petitioners' land, for single-family residences. Exhibits 100, 104; RT 2466-67, 2484-85. Other developers' applications to build homes in the foothills have since been approved. RT 3176-77. This lawsuit, as it comes to this Court, does not involve a challenge to the post-filing adoption of the General Plan.

Petitioners filed a second lawsuit on September 29, 1989, challenging the General Plan. Pet. App. A2. Although certain actions relating to consolidation of issues in the two cases took place, the California Court of Appeal held: "no part of [the second suit] has been tried, and the issues in that case are not before us in this appeal." Pet. App. A16 (footnote omitted). The present case is limited to the action filed on April 18, 1988, challenging City actions before adoption of the General Plan.

pursued in the present petition), the trial court required the jury to decide whether "the City's actions . . . [were] motivated with a purpose of intending to discriminate against [petitioners]" and were "substantially related to a legitimate governmental interest." Pet. App. A44. The jury answered these questions favorably to petitioners and awarded $11.5 million in damages. Pet. App. A4.

After the trial court required a new trial on damages, cross-appeals followed. Pet. App. A4.[7] With respect to the City's appeal on liability, the Court of Appeal reversed. It held that the evidence, viewed "in the light most advantageous to" petitioners, could not legally support a judgment finding a violation of petitioners' rights to substantive due process or equal protection. Pet. App. A17 (internal quotation marks omitted); *see id.* at A18-A37.

As to substantive due process, the court explained repeatedly that, as petitioners themselves urged, "the ultimate issue [is] whether the City's actions were irrational or arbitrary." Pet. App. A21 n.10; *id.* at A26, A27, A29, A3 n.1 ("the court must find that the 'provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' " (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).[8] Initially, however, the court ruled that, under long-established California property law, petitioners "had no vested right to develop their property in accordance with the zoning in existence at the time they submitted their review of plans application." Pet. App. A25. But even if petitioners may

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[7] The damages award had been based entirely on the City's new General Plan, adopted after the filing of this suit and not at issue in this suit. *See* note 6, *supra*; RT 2458-2509, 2702-12, 2858-2958, 2712-2850, 4548-49, 4653-69, 4784-85. The trial court set aside the damages award on this basis. JA 1293.

[8] That ultimate issue, the court several times noted, is an issue of law and was not presented to the jury. Pet. App. A3 n.1, A21 n.10, A27 n.14.

invoke substantive due process protection without establishing a state-law-based property right in the building permit they sought, the court concluded, petitioners' claim still fails (Pet. App. A26-A32), because the City's conduct was not " 'legally irrational in that it is not sufficiently keyed to any legitimate state interests.' " Pet. App. A28.[9]

In particular, the court observed that the City Council and its members, in taking action to adopt new citywide zoning standards and apply them to the area that included petitioners' parcel, were "respond[ing] to concerns of constituents in the affected area," which were well documented in the record. Pet. App. A29-A30. The court quoted the Ninth Circuit's recognition that " '[t]he opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions.' " Pet. App. A30 (quoting *Nelson v. City of Selma*, 881 F.2d 836, 840 (9th Cir. 1989)). *See also* Pet. App. A31 (agreeing with First Circuit's recognition of legitimacy of locality's " 'purpose of protecting what it viewed as the town's basic character' "). The court added that the R-3 zoning changes here were "general in nature," applying to "all foothill properties and 40 or 50 proposed projects north of a certain line," and that "[t]he City's refusal to allow the project to be grandfathered resulted in the project being subject to the same rules as all other properties covered by the revised R-3 ordinance." Pet. App. A30. Agreeing with other judicial cautions against turning run-of-the-mill disputes over development restrictions into federal constitutional claims under substantive due process (*id.* at A31-A32), the court rejected petitioners' claim,

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[9] The court quoted this formulation from the First Circuit decision in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992). The court below canvassed the formulations of substantive due process standards in land-use cases in the federal circuits and found no meaningful differences relevant to this case: all reject claims where a rational basis is present. Pet. App. A28-A29 n.15.

stating: "we find a rational basis for the City's actions." *Id.* at A30.

The court also rejected petitioners' equal protection claim. Pet. App. A33-A37. Here, too, the test was one of "rational relation to a legitimate government objective." *Id.* at A33; *see Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-63 (1988). The court noted that it was irrelevant whether "certain actions of the City Council, specifically including certain actions of Councilman Marks, were taken with [petitioners'] project in mind" and that it found "nothing arbitrary or irrational in Councilman Marks' opposition to the project." Pet. App. A35 n.19. The court then reasoned (*id.* at A36-A37):

> None of the actions taken by the City Council, on their face, applied to this project alone. The regulation of foothill property, including the apartment projects proposed here, is clearly a legitimate public purpose. This is particularly true in this case, since the environmental questions raised by opponents of the project have never been answered. Zoning regulation of multi-family apartment units is unquestionably a legitimate public purpose. The classifications adopted by the City Council were clearly related to that purpose and we find no substantial basis for plaintiffs' equal protection challenge.

The Supreme Court of California subsequently denied petitioners' request for review. Pet. App. A41.

ARGUMENT

The Court of Appeal in this case rejected petitioners' substantive due process challenge on the ground that the City's conduct—adopting generally applicable legislative zoning measures and insisting that these measures apply to petitioners before they constructed buildings that would contravene and thus undermine the citywide standards established in the zoning rules—plainly had a rational relation to the legitimate public purposes of neighborhood preservation and environmental quality. Petitioners now

seek review based on a portrayal of lower court disagreements over the proper standards for substantive due process analysis in land-use cases. All of that discussion, however, is utterly irrelevant to this case.

Quite simply, petitioners are not attacking, and could not attack, the legal standard applied below, because they got review of their substantive due process claim under the very legal standard that they say they are entitled to: the *Euclid* rational basis test. Moreover, none of petitioners' extensive discussion of other courts' decisions reveals any differences among courts that are remotely material here, because no court imposes a more demanding standard than the rational relation standard applied by the court below and endorsed by petitioners. Thus, there is no legal issue presented by this case. As certiorari is not warranted to review the lower court's correct application of the unchallenged legal standard to the specific facts in this case, the petition should be denied.

1. Petitioners' contention is that substantive due process requires that challenged restrictions on land use must meet the "rational relation" or "rational basis" test derived from *Village of Euclid v. Ambler Realty Co.*, *supra*, and *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). Pet. 15, 17; *see id.* at 13-19. Under petitioners' own view, and as the relied-on decisions of this Court make clear, that is the *most* they are entitled to in raising a claim based on substantive due process. If a land-use restriction meets that test, petitioners do not, and could not, suggest any authority for invalidating it under substantive due process.

Petitioners' argument for certiorari here must be rejected for the simple reason that the court below tested their claim under the very standard they urge. The Court of Appeal, after assuming that petitioners could invoke substantive due process without first demonstrating a state-law property entitlement to the desired building permits, reviewed petitioners' claim under the rational relation

standard that petitioners endorse: the court quoted the *Euclid* standard (Pet. App. A3 n.1) and said again and again that it was evaluating the City's conduct here under that standard. *See*, *e.g.*, Pet. App. A21 n.10 ("ultimate issue of whether the City's actions were irrational or arbitrary"), A27 ("[w]e therefore consider the sufficiency of the evidence of a substantive due process violation arising from arbitrary or irrational actions" (footnote omitted)), A28 (quoting First Circuit test of whether action " 'is legally irrational in that it is not sufficiently keyed to any legitimate state interest' "), A29 ("plaintiffs have not, as a matter of law, shown arbitrary or irrational government action"), A32 ("It is sufficient that [the legislative] processes are rational, and not arbitrary or irrational."). And the court framed its ultimate conclusion in the precise words petitioners use: "we find a rational basis for the City's actions." Pet. App. A30. There is no warrant whatever for a grant of certiorari to impose on the court below the legal standard that it has in terms already applied to petitioners' claim.

Petitioners therefore must resort to passing suggestions that the court below somehow departed from this standard when applying it. But such a challenge to the application of a correct legal standard is not normally a ground for certiorari, and in any event petitioners' suggestions of misapplication are devoid of merit. What the Court of Appeal correctly held, even viewing the evidence in the light most favorable to petitioners, was that the conduct at issue —both the generally applicable, legislative zoning rules about development in the foothills and the application of those rules to petitioners—had an obviously reasonable relation to traditional, legitimate public interests in neighborhood character and environmental quality. Given the clear evidence of community concern about neighborhood character, the environmental problems raised by petitioners' project, and the fact that the City's zoning measure applied citywide and did not remotely single out petitioners for special treatment, there is no basis for overturning the court's conclusion.

In particular, petitioners could not plausibly claim that there is anything illegitimate, or unfamiliar, about public officials' addressing a legitimate public concern through general legislative action and taking steps to ensure coverage of specific projects that present the targeted problem, including a specific project that was part of the impetus for the governmental action. *Cf. D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991) (in First Amendment context, nothing illegitimate about local ordinance triggered by awareness of specific project).[10] And this case does not involve a situation where an individual property holder has been singled out for treatment inexplicably different from that accorded other, similarly situated property owners (which is presumably why petitioners have dropped their equal protection claim). Moreover, petitioners' vivid descriptions of supposedly "Machiavellian" actions of Councilman Marks —he "ramroded" a measure through the City Council, he "imposed" a requirement (the City Council adopted a generally applicable measure), he "fashioned a procedure" (the City Council adopted a generally applicable measure), he "bullied and intimidated a Council colleague," *see* Pet. 8-9—are nothing more than the passionate characterizations, by one who lost in the political process, of the vigorous and determined efforts of a public official who opposed their actions on legitimate grounds. *See* Pet. App. A35 n.19 ("nothing arbitrary or irrational in Councilman Marks' opposition to the project"). There is nothing improper about public officials' aggressive pursuit of government action that is itself legitimate.[11]

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[10] We note again that that there is no takings claim made in this case. (Petitioners had not undertaken construction of their three-story apartment complex, and the City's actions hardly foreclosed development of their land.) Nor is there a distinctive due process "retroactivity" claim in this case. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994). (It is patently reasonable for a local government to apply new zoning standards to all projects not yet approved for construction.)

[11] Nor is there any merit to the apparent suggestion (not ever made openly as an argument) that the *jury* in this case was entitled

2. Petitioners devote the bulk of their petition to trying to portray two separate conflicts among the lower courts that they say justify review in this case. One alleged conflict involves the precise test applied to judging whether local government restrictions on land use are constitutionally justified under substantive due process doctrine. Pet. 11-19, 25-29. The other involves the question whether a "property" right under state law must be proved at the threshold to invoke substantive due process. Pet. 19-25. But whatever conflicts may exist on those issues cannot justify review here, because the resolution of any such disagreements cannot possibly affect the result in this case. As to the first, the supposedly conflicting standards are *less* favorable to petitioners than the standard applied by the court below. As to the second, the court below has already held that petitioners' claim must be rejected even if their view is correct on this issue. Thus, no differences among other courts on either issue could alter the rejection of petitioners' substantive due process claim in this case.

a. Petitioners' principal claim of conflict is that, while the rational relation test governs in most courts, a different test has been applied by the First Circuit and by at least some panels of the Seventh and Eighth Circuits (and a few state courts following these circuits). Pet. 11-19. Even if petitioners' characterizations of differences among circuits were correct, however, the point would be completely irrelevant here. After all, the minority's "aberrant position" (Pet. 16) is, according to petitioners, one that demands *less* justification from local governments than the rational relation test that was applied, and that petitioners ask to be applied, in this very case. Pet. 16-17. No conflict material to this case is created by other judicial deci-

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to decide the legal issue whether there was a rational basis for the action challenged as violating substantive due process. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938); *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

sions that would reach exactly the same result as the court below and provide petitioners even less of a claim than the court below recognized.

Although that is a sufficient reason to reject the supposed conflict as a ground for review in this case, petitioners have in fact overstated the differences among formulations in the circuits, which may not actually amount to any meaningful, outcome-determinative difference in legal requirements for local governments. Notably, while petitioners rely chiefly on the First Circuit as departing from the rational basis test derived from *Euclid*, it is hardly clear that the First Circuit truly has an "aberrant position" on this issue (Pet. 16). The very decision that petitioners cite, *PFZ Properties*, expressly invokes the requirement that the government action not be " 'legally irrational in that it is not substantially keyed to any legitimate state interests' " (quoting a D.C. Circuit decision) and then cites in support a First Circuit precedent that it quotes as applying a " 'rational basis' test." 928 F.2d at 31-32.[12] *See also Gilbert v. City of Cambridge*, 932 F.2d 51, 65-66 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) (explicitly invoking rational basis test); *Smithfield Concerned Citizens for Fair Zoning v. The Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990) (measure valid unless it "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense" (internal quotation marks omitted)); *cf. Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994) ("we have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in *every* conceivable case").

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[12] As petitioners note (Pet. 13), this Court initially granted reivew of *PFZ Properties*, but then, after briefing and oral argument, dismissed the petition as improvidently granted. *See* 503 U.S. 257 (1992).

Petitioners also suggest that there are some *intra*-circuit variations within the Seventh and Eighth Circuits. Pet. 17. That suggestion, however, furnishes no ground for review by this Court. The Circuits themselves, sitting en banc, are the proper places to resolve any such conflicts if they truly exist—that is, if any differences in formulation produce actual differences in result over what actions a local government is constitutionally permitted to take. And it would be particularly inappropriate, as we have noted, to grant review in a case like the present, where the most demanding of the allegedly differing standards has been applied and held satisfied.

Finally, petitioners point to an assortment of decisions that, they say, "have uniformly found substantive due process violations where actions of local officials are specifically directed at blocking a development project approval." Pet. 26; *see id.* at 25-29. But petitioners properly refrain from making any suggestion that these decisions establish as the law in particular circuits some standard different from and more demanding than the rational basis test they themselves endorse. And, in fact, all of the cited decisions that recognize a claim (few actually find liability) do so based on plainly illegitimate (*e.g.*, religion or speech-related) reasons for the challenged government actions or the complete absence of an apparent legitimate public purpose behind the action, often evidenced by a singling out of a particular property owner for treatment inexplicably different from that afforded similarly situated owners.[13] This case, of course,

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[13] *See Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 268, 269 (3d Cir. 1995) ("for reasons unrelated to the merits"; "reasons unrelated to an appropriate governmental purpose"), *petition for certiorari pending*, No. 95-249 (filed Aug. 11, 1995); *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) ("impermissible political animus"); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) ("partisan political or personal reasons unrelated to the merits"); *Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983) ("manifest arbitrari-

involves no such scenario. In short, petitioners' first question presented does not warrant review in this case.

b. Petitioners also seek certiorari here (their second question presented) on the ground that there is a circuit conflict over whether a landowner challenging a limitation on land use (through, *e.g.*, a building-permit requirement) must establish a state-law entitlement to the desired use (a "property" right, under *Board of Regents v. Roth*, 408 U.S. 564 (1972)) in order to invoke substantive due process. Pet. 19-25. Most of petitioners' presentation, aside from acknowledging the widespread recognition of such a requirement, does no more than point to several circuits that by their actions have "assume[d]" that no such showing is needed or that "appear" not to require such a showing or that are "divided on the issue." Pet. 20-22 (Ninth, First, Eighth, Seventh Circuits). But petitioners also quote a recent decision of the Third Circuit that seems squarely to reject such a requirement, allowing

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ness" and personal animus in singling out plaintiff); *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (religious basis); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) (demanded waiver of other constitutional right); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991) (requiring proof that action taken "for improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis"); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (not motivated "by legitimate regulatory concerns"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409, 1410 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) ("malicious, irrational and plainly arbitrary"; "for no legitimate reason"); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991), *vacated*, 113 S. Ct. 31 (1992), *on remand*, 987 F.2d 662 (9th Cir. 1993) (quoting *Euclid* test). (Later cases in the Ninth Circuit—the circuit embracing the State at issue here—repeatedly confirm that circuit's application of the rational basis test. *E.g.*, *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994); *Halverson v. Skagit County*, 42 F.3d 1257, 1261-62 (9th Cir. 1994); *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995).)

a landowner without more to invoke substantive due process to challenge restrictions on the land's use. Pet. 20, quoting *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 600-01 (3d Cir. 1995), *petition for certiorari pending*, No. 95-163 (filed July 28, 1995).

This conflict may warrant review in an appropriate case, at least if it can be shown that differences over this threshold step in the constitutional analysis result in bottom-line differences in constitutional result. But the conflict is utterly immaterial to this case. The Court of Appeal below expressly held that, even if petitioners are correct in their invocation of substantive due process in the absence of a state-law entitlement to their desired building permit, their substantive due process claim still fails—under the very rational basis test that petitioners endorse. Thus, even if petitioners were to prevail on their second question presented in the petition, the judgment below would remain unchanged, for they already have received from the court below everything that they could receive if they prevailed on their threshold "property right" contention: application of the rational relation standard to test the City's challenged actions. In these circumstances, the second question presented cannot affect the outcome of this case and cannot justify review.

3. Several other petitions are pending in this Court raising issues related to either the first or second of petitioners' questions presented. Those petitions, however, should in no way affect the disposition of this case: *this* petition should be denied. Those petitions which complain of allegedly *lesser* standards than the rational relation test cannot possibly affect this case, because petitioners received review under the rational relation test, precisely as they demanded.[14] And those petitions which raise the

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[14] *See Triomphe Investors v. City of Northwood*, No. 94-1991; *Woodpointe Inn Assoc. v. City of Harper Woods*, No. 94-2001; *Jolicoeur Furniture Co. v. City of Woonsocket*, No. 95-193.

threshold "property right" issue cannot possibly affect this case, because petitioners' claim was rejected below even on the assumption that they were correct in their view on this issue.[15] In short, even if this Court grants certiorari in one of the other cases, the petition in this case should be denied outright.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] *See Triomphe Investors v. City of Northwood*, No. 94-1991; *Zoning Board v. DePlasio*, No. 95-163; *Bensalem Township v. Blanche Road Corp.*, No. 95-249.

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No. 95-114

In the
Supreme Court of the United States
October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Two

BRIEF OF ALLIANCE FOR AMERICA, AMERICAN HOMEOWNERS FOUNDATION, AS *AMICI CURIAE** IN SUPPORT OF PETITIONERS

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[CONTINUED FROM COVER]

BRIEF *AMICI CURIAE* OF

BUILDING INDUSTRY ASSOCIATION,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
CITIZENS FOR PRIVATE PROPERTY RIGHTS,
DAVIS MOUNTAIN TRANS-PECOS HERITAGE ASSOCIATION,
ENVIRONMENTAL CONSERVATION ORGANIZATION,
GOLDEN STATE RESOURCE MANAGEMENT GROUP,
HILL COUNTRY LANDOWNERS ASSOCIATION,
LAND RIGHTS FOUNDATION,
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
SMALL BUSINESS SURVIVAL COMMITTEE,
TRANS TEXAS HERITAGE ASSOCIATION, and
DEFENDERS OF PROPERTY RIGHTS

QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution prohibit local governments from making arbitrary and abusive land use decisions that are not related to a legitimate government interest?

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**PUTTING PEOPLE FIRST,
SMALL BUSINESS SURVIVAL COMMITTEE,
TRANS TEXAS HERITAGE
ASSOCIATION, and
DEFENDERS OF PROPERTY
RIGHTS,
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief *amici curiae* in support of Petitioners, Stubblefield Construction Company and Stubblefield Properties. The *amici* support granting of the Petition for Writ of Certiorari. Consent to the filing of this brief has been granted by counsel for Petitioners and counsel for Respondent, and has been lodged with the Clerk of this Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Alliance for America (Gloversville, NY) is a fifty state network of nearly 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners all across the country. Groups under the Alliance's umbrella cover the full spectrum of property rights interests including the right to fair application of zoning laws.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping people make the best informed decision when purchasing a home.

Building Industry Association (Olympia, WA) is a federation of regional and local associations representing over 5,600 members engaged in commercial and light industrial

construction and the building of most of Washington State's residential housing. The interest of BIA-Washington in this case is to ensure that decisions regarding restrictions on development are made in a fair and predictable manner.

Citizens Against Repressive Zoning (East Lansing, MI) is an organization of citizens concerned about over-restrictive zoning laws. CARZ continuously monitors zoning decisions across the nation, and provides resources and advice to persons whose property interests have been adversely affected by zoning laws.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide organization whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

Citizens for Private Property Rights (Sullivan, MO) is a grassroots organization formed to protect and preserve the legal, equitable and traditional rights of property owners.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgement of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education and other activities. Its mission embraces conservation of natural resources in conjunction with

respect for private property rights, which underlie all other individual liberties.

Environmental Conservation Organization (Hollow Rock, TN) represents more than 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection. The organization believes that private property rights are the foundation of all free-market options, and that government regulation limits and precludes opportunities for free-market alternatives for environmental conservation.

Golden State Resource Management Group (Moreno Valley, CA) is a private consulting firm providing policy advice to farmers, ranchers, landowners and non-profit associations on the issues of endangered species, natural resource and environmental laws as well as regulations and their effects on land use. Many of Golden State's clients are located in the southern California area.

Hill Country Landowners Association (Georgetown, TX) was formed in 1991 in response to plans to designate a 30,000-acre endangered species habitat in the State of Texas. The Coalition opposes the enlargement of the authority of unelected officials due to the fact that they are not subject to voter approval and their decisions can be remedied only through litigation.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property as guaranteed by the United States Constitution and state constitutions. This

mission is accomplished through *The Land Rights Letter*, a monthly newsletter highlighting legislation, court decisions, individual accounts of regulatory abuse nationwide, and the Land Rights Archive -- an extensive reference and research library.

Oregonians in Action Legal Center (Tigard, OR) is a nonpartisan, nonprofit, public interest law center involved in litigation seeking to protect the constitutional rights of landowners and counter excessive land use regulation. It is financed entirely through the voluntary contribution of time and money from individuals, families, businesses and foundations on a continuing basis. OIA-LC successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate, and to develop and implement a strategy to restore reason and balance in environmental regulation -- including regulation in the form of zoning restrictions.

People for the West! Accord Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government. Its membership believes that people who own and depend on the land make better stewards of the environment, and that mankind has the ability to solve any legitimate environmental problems through sound scientific means.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature and civility in relation to his fellow man. They also believe that public policy should be based on science and rationality, not arbitrary political motivations.

Small Business Survival Committee (Washington, DC) is a national, nonprofit, nonpartisan advocacy organization fighting unchecked government taxation and regulation of small business -- the entrepreneurial sector of the United States economy. They believe that this case illustrates the plight of small business owners and entrepreneurs nationwide who follow local, state and federal laws only to become entangled in political and bureaucratic red tape where private property rights have no meaning.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership.

Defenders of Property Rights (Washington, DC) is a nonprofit public interest law foundation and the nation's only legal defense foundation devoted exclusively to protecting private property rights. Its mission is to vigorously protect those rights considered essential by the Framers of the

Constitution, and to promote a better understanding of the relationship between private property rights and individual rights and liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members, who are owners, users, and beneficiaries of private property, to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders devotes a significant portion of its resources to litigation and has participated in *Lucas v. South Carolina Coastal Council, Dolan v. City of Tigard and Babbitt v. Sweet Home Chapter Communities for a Great Oregon* when they were before this Court.

STATEMENT OF THE CASE

At issue in this case is the extent to which private property rights are protected under the Due Process Clause of the Fifth and Fourteenth Amendments. In recent years, this Court has done much to resuscitate the previously dormant provision in the Fifth Amendment requiring payment of just compensation for the taking of private property. *See, e.g., Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1987) (government regulation that destroys all beneficial and productive use of private property is a *per se* violation of the Just Compensation Clause of the Fifth Amendment); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) (property owner must be paid just compensation for even temporary taking of private property rights).

Most recently, in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994), this Court stated: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."

However, the Just Compensation Clause cannot be and was not intended by the framers of the Constitution to be the sole provider of full protection for private property rights. Rather, the Constitution contains several provisions designed to accomplish that purpose together. The Fourth Amendment, for example, protects against unreasonable searches and seizures. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment echoes the Fifth, stating that no "state shall deprive any person of life, liberty, or property without due process of law."

The Founding Fathers' intent to protect property rights is clear. They considered private property ownership critical to a free society. James Madison, the author of the Bill of Rights, stated this clearly in Federalist Paper No. 54, when he wrote "Government is instituted no less for protection of the property than of the persons of individuals." However, the modern crush of government regulations, and the now virtually unchecked power of government officials over an individual's use of his property (even for laudable purposes), is destroying the genius of the constitutional system of private property rights.

Until recently, this Court has not been called upon to affirm the protections contained in the Due Process Clause as applied to questions regarding the constitutionality of decisions by local officials over local land use. As a result, the court below was able to sanction an interpretation of the Due Process Clause that emasculates the notion of due process in cases such as this. The decision of the court below essentially gives local government free rein to target -- at will -- any private property owner for abuse.

Thus, the issue raised by this case is whether the Due Process Clause will retain its vitality in the face of such a broadside affront as is presented by the decision below. The facts of this case are clear. They paint a picture of local government officials, by virtue of their position and power, using the local government land use review process to wipe out one person's constitutionally-protected private property rights. In the early 1960's, the Petitioners, Stubblefield Construction Company and Stubblefield Properties, purchased approximately 600 acres of property in San Bernardino County, California in order to develop an entire master-planned community, including the 492-unit apartment complex at issue in this case. The thirty acres designated for the apartment units were zoned for such construction. In 1968, the Respondent, the City of San Bernardino, annexed the property with the assurance that existing zoning would be maintained. In reliance on that promise, the Petitioners invested heavily to prepare the property for construction by developing water, power and sewer connections.

In 1986, just when Petitioners thought they were in a position to gain permission from the Respondent to actually begin construction of the project, the City Council moved the goalposts to prevent development of the project. This arbitrary and abusive behavior by the government in refusing to approve the Petitioners' development plans grossly affronts the due process guaranteed to every property owner under the Fifth and Fourteenth Amendments.

Instead of providing a fair and indiscriminatory system of review for land use decisions, the Respondent systematically used every arrow in its quiver to target and kill the Petitioners' development plans. In doing so, it failed to state a single legitimate health, safety, or welfare concern over the project. Rather, as the trial court found, one specific City Councilman was a "powerful opponent" of the Petitioners' development plans. For example, the City Council adopted an "urgency" ordinance which allowed it to freeze the Petitioners' project until it could change the zoning law to further restrict the Petitioners' development plans. The only "urgent" rationale for the ordinance was that it would prevent the project from ever being built. In short, public power was used by elected officials to accomplish personal goals.

After a public hearing, John Stubblefield was told by the mayor of the San Bernardino that he was not allowed to testify regarding his proposed project because "[t]he Council had met [in closed session], they had all made up their mind that this project was going down to defeat so why talk about

it."[1] In 1989, the Respondent finally succeeded in killing the Petitioners' project by adopting a new General Plan for the area which downzoned his property so that only four residential units were permitted.

The pervasive regulatory state existing today, as opposed to fifty or even twenty years ago, makes it imperative that this Court establish that government regulation of the reasonable use of private property, such as that at issue in this case, be applied fairly and rationally. Federal, state and local laws affecting private property have -- in the modern regulatory state -- become an elaborate web of laws and regulations covering every conceivable aspect of property use and ownership.

Therefore, the time has come for this Court to end local tyranny and the cavalier destruction of private property rights. This Court put it well when it declared over a century ago that "A government which held the lives, the liberty and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic dispository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." *Loan Assn. v. Topeka,* 87 U.S. (20 Wall.) 655, 662 (1874).

By reversing the opinion of the court below, this Court will assure all Americans that their property rights cannot be destroyed at the whim of a local despot.

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[1] *Reporter's Transcript on Appeal* at 2614.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

THIS CASE RAISES AN ISSUE OF CRITICAL IMPORTANCE FOR PRIVATE PROPERTY OWNERS -- WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS PROTECT PRIVATE PROPERTY RIGHTS AGAINST ARBITRARY AND ABUSIVE INFRINGEMENT BY GOVERNMENT.

This Court has long recognized that a landowner has a constitutional right emanating from the Fifth Amendment "to devote his land to any legitimate use of property within the protection of the Constitution." *Washington ex rel Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121 (1928). This right has been buttressed in recent years by several landmark decisions of this Court applying the Just Compensation Clause to require governments to pay property owners if a regulation effects a taking of private property. *See, e.g., Lucas*, 112 S. Ct. 2886. This Court continues to affirm that the Just Compensation Clause specifically entitles a property owner to make reasonable use of his land: "[T]he right to build on one's own property -- even though its exercise can be subject to legitimate permitting requirements -- cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987).

Yet, however efficacious the Just Compensation Clause may be in deterring burdensome or confiscatory regulations on private property rights, it has little utility in the face of government actions that discriminatorily target individual property owners -- as do challenged actions in this case. Even the *Nollan* case, which sets forth the farthest application of the Just Compensation Clause in this context of challenging the validity of a confiscatory regulation, only requires that government actions "substantially advance" their stated purpose. *Nollan* does not address the allegations of abuse of authority in situations where government officials misuse legitimate laws and the conduct of the government officials is aimed exclusively at precluding an individual from exercising his constitutional right to use his property. Nor does this Court's recent decision in *Dolan*, 114 S. Ct. 2309 (exactions of private property must be "roughly proportional" to the burden they purport to address), provide relief from the arbitrary infringement of private property rights presented in this case.

As this Court has made clear on many occasions, the Just Compensation Clause is not designed to probe the motivations of the decision makers.[2] Rather, it is a "no-fault" concept that merely requires payment when government action takes private

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[2] *But see Dolan*, 114 S. Ct. at 2319 (local government's decision to deny a building permit unless the property owner gave to city approximately 10 percent of her property violated the Just Compensation Clause unless the city could show a "rough proportionality between the impact and the extent of the exaction"); *Nollan*, 483 U.S. at 3147 (regulation that impacts private property rights must substantially advance its stated purpose).

property. Once established that a taking is for any legitimate public purpose (and legitimate public purpose is broadly defined),[3] and that the taking substantially advances the stated legitimate public purpose, the only scrutiny under the Just Compensation Clause is whether and to what extent the governmental actions impact a private property owner's reasonable investment-backed expectations. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (if a zoning law is substantially related to the promotion of the general welfare then the only takings consideration remaining is the severity of the law's interference with the owner's property). Whether the government action is wise, virtuous or even necessary is irrelevant to the constitutional requirement of just compensation. *See Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979) (the fact that Congress had "expansive authority" to regulate was immaterial to whether or not the regulation went so far as to effect a taking requiring compensation); *see also United States Trust Co. v. New Jersey,* 431 U.S. 1, 29-30 (1977) (no matter how important and legitimate the public purpose is for regulation, the court will not "balance away" constitutional rights).

However, the Due Process Clause is, as the name implies, specifically designed to probe whether the process by which property is infringed is fair. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the purpose of the Due Process Clause

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[3] *See, eg., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("deference to the legislature's 'public use' determination is required 'until it is shown to be an impossibility,'" (*citing Old Dominion Co. v. United States,* 269 U.S. 55, 56 (1925)).

is to prevent government from abusing its power or employing it for purposes of oppression). When the process afforded private property owners is unfair, or when local governments succumb to private biases or interests, then clearly the Due Process Clause is implicated. The Due Process Clause, quite simply, forbids *all* deprivations of property by governmental action that is arbitrary, unreasonable or violative of fundamental principles of fairness. Thus, the issue in a due process case is not whether the government has the power to "take" the property, but whether the *deprivation* of property has been accomplished in a *manner* protective of fundamental individual liberties. In short, due process focuses upon the method by which land use controls are imposed, while just compensation examines only the result of the process. To be valid, both the process and result of a land use restriction must comport with these separate but related constitutional protections.

In the present case, it is the misuse of the process that failed to comply with the constitutional requirement of fairness and justice. The repeated and consistent maneuvering and obstructionist conduct of the government officials to halt the Petitioners' project for personal reasons is the gravamen of this due process violation. Indeed, the trial court found that the Respondent arbitrarily changed its zoning law with an intention of sabotaging the Petitioners' development project; the court of appeals even had to concede that the process operated as a "vendetta" against the Petitioners.

Unfortunately, the facts presented here are not unique. Local zoning decisions, because of the inherently *ad hoc* and discretionary nature of the decision-making process, are often subject to abuse and unfairness. *See generally* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out Of Substantive Due Process*, 16:2 U. Dayton L. Rev. 312 (1991). Decisions regarding the use of one's property all too frequently are driven by local politics and the personalities of the people involved.[4] Over recent years the situation has been exacerbated at the local level due to the increasing number of federal and state laws granting even greater authority to local governments with respect to land use decisions. Thus, strong guidance is needed from this Court to set appropriate standards whereby government officials can exercise their authority in accordance with the constitutional requirement of due process.

II.

THE FAILURE OF THIS COURT TO DEFINE WHAT PROCESS IS DUE AN INDIVIDUAL WITH RESPECT TO THE REASONABLE USE OF HIS

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[4] Take for example the recent case reported in the Wall Street Journal where a government official voted to deny approval of a requested building permit on a wholly arbitrary basis, stating: "In my former life as a seagull, I was flying up and down the California coastline and saw your house built shaped as a seashell...out of driftwood and feathers." Stephen Page, *In My Former Life as a Seagull*, WALL ST. J., Dec. 27, 1994, at A14.

PROPERTY HAS LED TO MUCH CONFUSION BY LOWER COURTS.

The failure of this Court to articulate definitive standards that govern arbitrary and capricious government decisions concerning property rights in the realm of actions prohibited by the Due Process Clause has led to uncertainty among litigants and judges among the various circuit courts of appeals. Indeed, within just the past few months, federal courts across the nation have wrestled with questions of the nature and extent of due process protections as applied to local land use decisions. In *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit adopted a broad test holding that property ownership *per se* is entitled to due process protection under the Fourteenth Amendment. Judge Lewis, writing for the Third Circuit, held that a due process claim would lie where the decision limiting land use was arbitrary or irrational.

In contrast, the United States Court of Appeals for the Sixth Circuit has adopted a more restrictive test holding that a plaintiff must show not only a property interest but also that he had a legitimate claim of entitlement to a special use permit or a justifiable expectation that the city council would issue the permit before a cause of action would lie under the Due Process Clause. *Triomphe Investors v. City of Northwood,* 49 F.3d 198 (6th Cir. 1995). In *Triomphe*, the court held that the property owner did not have a "legitimate expectation" to a special permit, even if the requirements for the permit had been

met, because the city ordinance provided that such a permit "may" be granted; the court reasoned that the word "may" gave the city council the discretion to refuse to grant the permit on the basis of any evidence, rather than on substantial evidence. *Id.* at 203.

The most restrictive test of all was announced by the United States Court of Appeals for the Seventh Circuit in *Mid-American Waste Systems v. City of Gary,* 49 F.3d 286 (7th Cir. 1995). In *Mid-American,* the court held that the corporate plaintiff did not have a right to challenge the city's allegedly arbitrary cancellation of its lease because "[t]he only interest at stake is the interest in obtaining the maximum return on investment. This is not a 'fundamental right.'" *Id.* at 291 (citing *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995)). This statement suggests that a businessman or certainly a corporation would not have a right under the due process clause to challenge even an illegal denial of a zoning variance if its motive was that of profit.[5]

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[5] The *Mid-American* decision is constitutionally flawed on its face because it is discriminatory. The Due Process Clause does not exclude corporations and business people from its coverage: it makes all property owners a protected class. If due process means anything, it means that all property owners should have access to the courts to remedy due process violations.

CONCLUSION

Strong policy concerns weigh against this Court's adopting an expansive interpretation of the Due Process Clause. Valid concerns of judicial activism, growing out of the legitimate question of whether courts can objectively define "arbitrary" or "abusive" governmental conduct, argue against an open-ended definition of the clause. Nevertheless, the Constitution states explicitly that individuals shall not be deprived of "property" without "due process of law." However, that is just what happened to the Petitioners in this case. Moreover, it is what is happening and will continue to happen across the country unless this Court definitively holds that the Constitution will not countenance governmental conduct that unfairly or otherwise arbitrarily infringes private property rights.

For all of these reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STUBBLEFIELD CONSTRUCTION COMPANY AND
STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNADINO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of California Fourth Appellate District, Division Two

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY LEGAL DEFENSE FONDATION, THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, THE NATIONAL REALTY COMMITTEE, THE NATIONAL MULTI HOUSING COUNCIL AND THE TEXAS CAPITOL AREA BUILDERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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1 Anderson, American Law of Zoning, Fairly debatable issue, § 3.20 (3d ed. 1986 and Dec. 1994 Cum. Supp.).32

In The

Supreme Court of the United States

October Term, 1995

No. 95-114

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNARDINO,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, THE NATIONAL REALTY COMMITTEE, THE NATIONAL MULTI HOUSING COUNCIL and THE TEXAS CAPITOL AREA BUILDERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB"), the Building Industry Legal Defense ("BILD") Foundation, the National Association of Industrial and Office Properties ("NAIOP"), the National Realty Committee ("NRC") the National Multi Housing Council ("NMHC"), and the Texas Capitol Area Builders Association ("TCABA") have received the parties' written consent to file this brief as *amici curiae* in support of the petitioner and have filed the letters of consent with the Clerk of the Court.

I.
THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW OF ACTIONS WHICH INVOLVE THE USE OF LAND

The NAHB represents over 180,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers or remodelers. It is the voice of the American shelter industry.

It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal*

Commission, 483 U.S. 825 (1987),[1/] and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

NAIOP is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real

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[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

estate developers, but also architects, brokers, master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups.

The NRC serves as real estate's roundtable in Washington where it leads the active involvement of the nation's principal real estate owners, advisors, builders, investors, lenders, and managers in the national policy process.

The NMHC is a national association representing the interests of the nation's largest owners and operators of multi-family rental housing. Its members are engaged in all aspects of the development and operation of rental housing including ownership, building, financing, and management involving millions of rental housing units. Since its formation in 1978, the NMHC has been

actively involved in all facets of public policy that are of strategic importance to participants in the multifamily housing industry.

The TCABA is a trade organization with over 700 members who are single and multi-family house builders, land developers, remodelers, and product or service companies involved in the house building industry.

The *amici curiae* submit their *amici curiae* brief in support of the petitioners in the present case in order to assist the Court in determining whether to grant its writ of certiorari to determine if the property protected by the Fifth and Fourteenth Amendments to the Federal Constitution inheres in the ownership of land or if, as asserted by several of the federal circuits and the state courts which have begun to follow

those circuits, the existence of a protected property right in the use of land exists only when government has no discretion with respect to that use.

II.

SUMMARY OF THE ARGUMENT

The petitioners' brief in support of their petition for certiorari has pointed out that the decision in the case at bar followed the courts of appeals for several of the federal circuits which have adopted an "entitlement" theory to determine when a property right worthy of constitutional protection exists; a theory which holds that the property right protected by the Fifth and Fourteenth Amendments to the federal Constitution arises in the land use context only when the use of that land is not subject to discretionary governmental

regulation, i.e., when the approval sought must be granted. This is contrary to the decisions of this Court which have held that the property right protected by the Constitution is the right to use land subject, of course, to reasonable regulation.

The adoption of the entitlement theory has the effect of stripping land of all constitutional protection which is neither correct nor necessary. The concerns which have been identified by the circuits which have adopted the entitlement theory have centered primarily on fears that a broader recognition of what constitutes property in the land use regulation context will cause the federal courts to become super boards of zoning appeals, substituting their views of what constitutes reasonable land use regulation for that

of the properly constituted local governmental authorities. These fears are without foundation.

Other mechanisms, including the abstention doctrine set forth over 50 years ago in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and the deferential "fairly debatable" rule set forth 70 years ago in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), guarantee that the federal courts will not become boards of zoning appeals which will substitute their own judgments for those of local land use authorities.

The intended effect of the adoption of the entitlement theory by the federal courts is to force land use cases back into state courts. The unintended result has been an uncritical adoption of the entitlement theory by some state courts which means, in those states, that a

landowner is stripped of constitutional protection in the land use regulation context regardless of where judicial review is sought. While abstention is not available in state courts, the same deferential "fairly debatable" rule is routinely used.

Although the present petition seeks review of a state court decision, the stakes are much higher. Review by this Court is necessary to tell both federal and state courts whether the Fifth and Fourteenth Amendments have any application at all in the land use regulation context.

III.

THE COURTS OF APPEALS AND THE STATE COURTS THAT HAVE EMPLOYED THE ENTITLEMENT ANALYSIS HAVE DISREGARDED ALMOST A CENTURY OF THIS COURT'S ANALYSIS OF WHAT CONSTITUTES PROPERTY

This Court has held that the use of land is part of the property protected by the Fifth and Fourteenth Amendments.

> "And the Court has frequently emphasized that the term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The term is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] ... denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it.* ... The constitutional provision is addressed to *every sort of interest* the citizen may possess.' *Id.*, at 377-378 (emphasis added)." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142-143 (1978)(Rehnquist, J., dissenting).

In the absence of zoning, the owner of land has the right to use that land for any purpose not prohibited by the

common law of nuisance. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 681 (1976)(Stevens, J., dissenting). For this reason, the Court has held that the property right inheres in the ownership of land.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

The Court has also held that the use of land is not a governmental benefit but, rather, a right, the exercise of which "can be subjected to legitimate permitting requirements...." *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

IV.

THIS COURT HAS ANALYZED GOVERNMENTAL INTERFERENCE WITH THE USE OF LAND WITHOUT EVER CONCERNING ITSELF WITH THE EXISTENCE OF DISCRETION IN THE LAND USE REGULATORY AGENCY WHOSE ACTIONS HAVE BEEN QUESTIONED

Property, in the land use regulation context, receives its constitutional protection under the Fifth Amendment, which prohibits the federal government from taking property without the payment of just compensation, and the Fourteenth Amendment, which prohibits the states from depriving anyone of property without due process of law and which also incorporates the Fifth Amendment's prohibition against uncompensated takings. *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309, 2316 (1994).

It is precisely because the Court has held that it is the ownership of land which is the property right to be protected by the Fifth and Fourteenth

Amendments that it has repeatedly reviewed actions taken by federal and state agencies when landowners have contended that those actions have violated their constitutional rights.

Further, the Court's repeated willingness to review land use cases demonstrates its continued adherence to the fact that "individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, - U.S. -, 114 S.Ct. 492, 505 (1993).

A. The Court Has Analyzed Actions By Local Governments To See If Land Use Regulations Deprived Landowners Of Their Rights To Due Process

There are a number of cases where the Court has looked to see whether actions taken by local governmental agencies involving the regulation of land have violated the landowners' Fourteenth

Amendment's right to due process. These include *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904), *Welch v. Swasey*, 214 U.S. 91 (1909), *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), *Pierce Oil Co. v. City of Hope*, 248 U.S. 498 (1919), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Zahn v. Board of Public Works*, 274 U.S. 325 (1927), *Gorieb v. Fox*, 274 U.S. 603 (1927), *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *City of Eastlake v. Forest City Enterprises*,

Inc., 426 U.S. 668 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

All of these cases recognized that the use of land may be regulated but that the regulations must be reasonable; local governmental agencies do not have the right to act in an arbitrary or capricious manner when they regulate the use of land.

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow*, *supra*, 277 U.S. at 188.

Nectow involved a landowner's desire to obtain a building permit but the Court did not review Cambridge's building code to determine whether the landowner was entitled to that permit as a matter of right nor whether the City had the discretion to grant or withhold it. *Nectow* does not stand alone; in none of the cases cited above did the Court explore, or even mention, the fact that the actions involved were discretionary.

B. The Court Has Analyzed Land Use Regulatory Action By The Federal Government To See If Those Actions Have Taken The Land Affected By Them

The Court has analyzed actions by the federal government to determine whether actions involving the use of land have taken land under the Fifth Amendment. These include *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

Both *Kaiser Aetna* and *Riverside Bayview* involved discretionary dredge and fill permits administered by the Army Corps of Engineers. 33 U.S.C. §§ 403 and 1344. The Court did not explore, or even mention, the fact that the permits were discretionary.

C. The Court Has Analyzed Land Use Regulatory Actions By Local Governments To See If Those Actions Have Taken The Land Affected By Them

The Court has analyzed a number of actions involving land use by state and local governments to determine whether the result was a taking which required the payment of just compensation under the Fifth Amendment as made applicable to

the states by the Fourteenth Amendment[2/]. These include *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, - U.S. -,

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2/ The fact that the Due Process Clause of the Fourteenth Amendment incorporates the Takings Clause of the Fifth Amendment demonstrates that the meaning of property under both Amendments is the same.

112 S.Ct. 2886 (1992), and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

Every one of these cases involved a discretionary act by the state or local government involved - either the imposition of a restriction on the use of the land involved or the denial or conditional approval of a land use permit. In none of the cases did the Court explore, or even mention, the fact that the action under review was discretionary.

D. The Court Recognized The Existence Of A Property Right In The Use Of Land In Every One Of The Land Use Cases It has Reviewed

The important issue in every one of the cases cited above is not whether the landowner won or lost; instead, it is the fact that the Court addressed the issue

of whether governmental action constituted an improper interference with the landowner's property rights. The rule set down by the Court is that, before any federal court considers whether a constitutional right has been violated, the existence of that constitutional right must be demonstrated. *Siegert v. Gilley*, 500 U.S. 226 (1991).

When it comes to the property right in question in cases where the issue is the effect of governmental regulation on the use of land, the Court could not have been clearer. See *Roberge* and *Nollan*, *supra*. However, even if the clear statements in *Roberge* and *Nollan* had never been made, history and common sense indicate that constitutional protection was meant to be provided whenever government regulates the use of land.

Lucas, supra, 112 S.Ct. at 2899-2900 (ownership of real property enjoys more protection than ownership of personal property). *See also Minnesota Mining Co. v. National Mining Co., 70 U.S. (3 Wall.) 332, 334 (1866)(stare decisis particularly important when real property is involved).*

V.

USING THE ENTITLEMENT THEORY OF PROPERTY WOULD READ THE PROTECTION OF LAND RIGHT OUT OF THE CONSTITUTION

The petition has identified the federal circuits which have adopted the entitlement theory. (Petition at 19-25.) The case at bar demonstrates that their views have begun to influence state courts. California does not stand alone; other state courts have also adopted the entitlement theory. See, e.g., *Red Maple Properties v. Zoning Commission*, 222

Conn. 730, 610 A.2d 1238 (1992), which relies on Second Circuit case law, and *Boulder City v. Cinnamon Hills Associates*, 110 Nev. 238, 871 P.2d 320 (1994), and *Security Management Corp. v. Baltimore County*, 104 Md.App. 234, 655 A.2d 1326 (1995), both of which rely on Fourth Circuit cases.

If those circuits and those states which use the presence of discretion in land use regulation[3/] to determine the nonexistence of property rights are correct, then a landowner has no property

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3/ Discretion, in the land use regulation context, means that the government has the right to deny or impose conditions on a landowner's application. There is no discretion only when there is a "certainty or a very strong likelihood" that the approval will be granted and "the opportunity of the local agency to deny issuance" is virtually nonexistent as a matter of law. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert denied*, 493 U.S. 893 (1989).

rights under either the Fifth or the Fourteenth Amendment. Applying the entitlement theory would mean that government - federal, state, or local - could regulate the use of land through discretionary land use approvals but that, having done so, it would not then be required to provide the protection of procedural due process nor would it be subject to either the limitations of substantive due process or the just compensation requirement of the Fifth Amendment.

The simplest example is, of course, the imposition of zoning itself. *Village of Euclid*, supra, upheld the validity of the adoption of a comprehensive zoning plan for the entirety of the village, surely a discretionary act. However, if the presence of discretion is enough to strip land of its status as property,

then how can the Court's decision in *Lucas v. South Carolina Coastal Council*, *supra*, be explained? In *Lucas*, the Coastal Council drew a line in the sand and said that there could be no development seaward of that line. Certainly no one would argue that the Coastal Council did not have the discretion to determine what uses, if any, would be allowed seaward of the line. But, if the entitlement theory applies, then the discretion inherent in the Coastal Council's determination as to what uses would be allowed seaward of the line would have meant that there was no property right involved and therefore no possibility that Mr. Lucas's land could have been taken as a result of the Coastal Council's action.

The same thing is true when it comes to the issuance of a discretionary land

use permit. *Dolan* and *Nollan*, *supra*, involved precisely that situation. There was no question that both the California Coastal Commission and the City of Tigard had discretion as to whether to issue land use permits and, if so, what conditions to impose on the issuance. Neither Mrs. Dolan nor Mr. and Mrs. Nollan could have prevailed on their claims that the conditions imposed on the issuance of the permits took their land if the existence of discretion meant that they had no property rights subject to the protection of the Constitution.

In other words, if the entitlement theory is correct, then no landowner has any protectable property right in the use of that land if discretionary land use permits are required. Moreover, the necessary corollary is that this Court wrongly decided a score of cases,

beginning in 1904 and culminating in *Dolan*, *Nollan*, and *Lucas*.

VI.

EXPEDIENCY AND A DESIRE TO AVOID DEALING WITH LAND USE ISSUES DO NOT JUSTIFY STRIPPING LANDOWNERS OF THEIR CONSTITUTIONAL PROTECTION

The Court has made it clear that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The exceptions to that obligation are few and far between. *Ankenbrandt v. Richards*, - U.S. -, 112 S.Ct. 2206, 2210 (1992)(domestic relations), and *Markham v. Allen*, 326 U.S. 490, 494 (1946)(probate). Neither a dislike of the subject matter[4/] nor a

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/ The clearest example of the dislike shown by some federal courts may be found in *River Park, Inc. v. City of Highland*

desire to remove cases from dockets are among the reasons that the Court has given for refusing or abstaining from the exercise of jurisdiction. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), *Colorado River, supra, Younger v. Harris*, 401 U.S. 37 (1971), *Burford v. Sun Oil*

Park, 23 F.3d 164, 165 (7th Cir. 1994):

> "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, ..."

In fairness to the Seventh Circuit, it must be pointed out that the Court of Appeals recognized that the property right inhered in the ownership of the land, that zoning is a limitation on the uses which would otherwise be available, and that allowing government to impose land use regulations does not mean that those regulations are unreviewable. *Id.*, 23 F.3d at 165-166.

Co., 319 U.S. 315 (1943), and *Railroad Commission v. Pullman Co.*, *supra*.

The circuits which have adopted the entitlement theory frequently refer to their desire not to become boards of zoning appeals, with or without a cite to Justice Marshall's dissent in *Village of Belle Terre*, *supra*, 416 U.S. at 13. See, e.g., *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992), and *RRI Realty Corp.*, *supra*, 870 F.2d at 918. Unfortunately, they never refer to the fact that, while Justice Marshall did not want to see federal courts substitute their judgments for those of local land use author-ities, neither did he want to see federal courts abdicate their obligation to provide constitutional oversight of those judg-ments. *Id.*, 416 U.S. at 14. His dissent argued that the Court had erred and that

it should have held the village's ordinance limiting the number of unmarried residents who could occupy a single family home unconstitutional. *Id.*, 416 U.S. at 20.

The circuits which have adopted the entitlement theory have recognized that, in many cases, the result will be that arbitrary actions - whether substantive or procedural - will go unreviewed and unremediated. See, e.g., *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-204 (6th Cir.), *petition for cert. filed* (1995)(No. 94-1991)(substantive), *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 826-828 (4th Cir. 1995)(procedural and substantive), and *Sequin v. City of Sterling Heights*, 968 F.2d 584, 590-592 (6th Cir. 1992)(procedural).

There are already ways to ensure that federal courts do not cross the line and unduly interfere with the judgments of local land use regulators.

First, if there are substantial, unresolved questions of state law which would obviate the need for a constitutional decision, *Pullman* abstention is available. See, e.g., *Fields v. Rockdale County*, 785 F.2d 1558 (11th Cir. 1986), and *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 2460, *cert. denied*, 476 U.S. 1170 (1986).

Second, when a constitutional decision is required, the decision of the local land use authority must be upheld if that decision is "fairly debatable." *Village of Euclid*, *supra*, 272 U.S. at 388. This deferential standard of review is, by itself, a guarantee that federal

courts will not become boards of zoning appeals.

The possibility that courts will substitute their views for those of the local governmental authorities charged with the responsibility for regulating land use is as of much concern to state courts as it is to federal courts and the solution is the same. The "fairly debatable" standard has been adopted by virtually every state court. 1 Anderson, American Law of Zoning, Fairly debatable issue, § 3.20 (3d ed. 1986 and Dec. 1994 Cum. Supp.).

In other words, there is no institutional reason why land use regulation should not continue in the future to receive the same constitutional protection that the Court has accorded it in the past and no reason why that protection cannot be provided in either

the federal or the state courts of the nation.

VII.

CONCLUSION

The Court in *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972), intended to extend the protection provided by the Fourteenth Amendment beyond that provided to land:

> "The Court has also made clear that the property interest protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." [Footnote omitted.]

It is no accident that the courts of appeals and the state courts which have adopted the entitlement theory as the measure of the existence of a protected

property right when it comes to the regulation of the use of land have not cited the foregoing portion of *Roth* nor have they cited either *Roberge* or *Nollan*. Had they done so, they could never have come to the conclusion that the presence of discretion in land use regulation means that there is no property right which could possibly be in issue.

The right to use land, subject to reasonable regulation, is a property right protected by the Fifth and Fourteenth Amendments. That is the law as stated by the Court and it is binding on the Courts of Appeals and the District Courts until the Court chooses to change it. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534, 535 (1983). Given the division amongst the

circuits[5/] and the clear misunderstanding of the law evidenced by those circuits and those state courts which have adopted the entitlement theory, it is necessary that the Court grant the petition for writ of certiorari in order to bring order to an increasingly disordered lower federal judiciary and, if the Court does not speak, to avoid the potential disappearance of constitutional protection for the owners of land in state courts.

5/ Two cases are presently before the Court seeking review on the very issue discussed in this brief. See *Triomphe Investors v. City of Northwood*, No. 94-1991, and *De Blasio v. Zoning Board of Adjustment*, No. 95-163. *Triomphe*, a Sixth Circuit case, followed the entitlement theory; *De Blasio*, a Third Circuit case, held that the property right inhered in the ownership of the land.

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No. 95-114

In the

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY
and STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

Petition for Writ of Certiorari
to the Court of Appeal of California
Fourth Appellate District, Division Two

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari
to the Court of Appeal of California
Fourth Appellate District, Division Two

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are

attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning constitutional protections for property rights before this Court and other courts representing both amicus curiae and property owners. Many of these cases involved land use and the Due Process Clause, including *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), in which PLF attorneys were counsel of record, and *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which PLF participated as amicus curiae. PLF also participated as amicus curiae before this Court in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).[1]

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

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[1] PLF has also participated in every major case before this Court in the last two decades involving land use and the Takings Clause. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304 (1994).

STATEMENT OF THE CASE

Petitioners Stubblefield Construction Company and Stubblefield Properties (Stubblefield) own property located within the limits of respondent City of San Bernardino (City). Stubblefield's parcel had been zoned R-3, allowing for multifamily housing, from the time the property was annexed by the City in 1968. *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 696 (1995), Petition for a Writ of Certiorari (Pet.) at A-6. In May, 1986, Stubblefield submitted to the City a development application for a 492 unit apartment project. The zoning at that time allowed for as many as 638 units on the parcel and, according to the City's planning director, the application met all the requirements then in place. *Stubblefield*, 32 Cal. App. 4th at 697 n.4, Pet. at A-7 n.4.

Stubblefield's application was not approved, however. It was not approved because of a series of actions taken by the City to delay final approval until the downzoning of the parcel reduced the number of units that could be developed to just four. *Id.* at 698, Pet. at A-8-9. On September 10, 1986, the City Council passed an ordinance allowing third parties to appeal planning department decisions that the lack of significant impacts would excuse a project from the requirement of a costly and time-consuming environmental impact report (EIR). On October 20, 1986, the City adopted an "urgency ordinance," effective in 30 days, that ended its policy of processing development applications under the zoning rules in force when the application was submitted. *Id.* at 697, Pet. at A-8. Both of these ordinances were sponsored by City Councilman Steve Marks, a vocal opponent of Stubblefield's project.

Two days later, the City's R-3 zoning ordinance was amended to impose a two-story height limit on apartments and to require a conditional use permit to exceed this limit. Stubblefield's project contained three-story apartment

buildings. *Id.* To insure that the new R-3 zoning ordinance would apply to Stubblefield's project under the urgency ordinance, Marks delayed final approval of the project by personally appealing the planning department's EIR decision, using the ordinance he had sponsored. Thus, approval was not received within 30 days of passage of the urgency ordinance, and the new R-3 zoning requirements controlled the project. *Id.* at 698, Pet. at A-9.

Stubblefield requested that its project be "grandfathered" so that the project would be evaluated under the zoning rules in place when the application was submitted. The City delayed action on this request for over one year. In the meantime, a moratorium on development was implemented in response to a lawsuit challenging the City's general plan. The grandfathering request was denied on January 19, 1988, at a hearing in which Mr. Stubblefield was not allowed to speak for petitioners. Five months later the moratorium was lifted and Stubblefield's property was downzoned to allow only four apartment units. *Id.* at 699-700, Pet. at A-10-12.

This pattern of events was more than a run of bad luck for Stubblefield. A subsequent 10-week, 31-day jury trial resulted in the accumulation of evidence showing that a number of the City's actions were taken for the purpose of delaying and blocking Stubblefield's project. *Stubblefield*, 32 Cal. App. 4th at 714, Pet. at A-35. The urgency ordinance was justified solely by "the desire to block approval of the Stubblefield project." *Id.* at 698, Pet. at A-8. The change in the height limit of R-3 structures and an amendment requiring that structures be compatible with their neighborhood were also "aimed at the Stubblefield project." *Id.* at 697-98, Pet. at A-7-9.

The jury decided that the City's actions were not "performed for a purpose which was substantially related to the public health, safety, morals or general welfare," Pet.

at A-43, were "motivated with a purpose of intending to discriminate against Stubblefield," Pet. at A-44, and resulted in harm to petitioners totaling $11,537,000. *Stubblefield*, 32 Cal. App. 4th at 694-95, Pet. at A-44-45. On the basis of these findings, the court entered judgment in petitioners' favor, determining that the City's actions violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment under 42 U.S.C. § 1983.[2] The trial court denied the City's motion for judgment, notwithstanding the verdict, and granted the City's motion for a new trial on the damages issue. *Id.* at 695, Pet. at A-4.

The California Court of Appeal reversed this judgment, holding that actions taken in response to "concerns of constituents in the affected area and other political concerns" are "not, as a matter of law ... arbitrary or irrational." *Stubblefield*, 32 Cal. App. 4th at 710-11, Pet. at A-29. Even the unusual efforts of Marks to defeat the project "merely represent the democratic process at work." *Id.* at 714 n.19, Pet. at A-36 n.19. The Court of Appeal belittled the case as "an ordinary dispute between a developer and a municipality." *Id.* at 712, Pet. at A-32. Since the R-3 amendments and the moratorium applied generally, petitioners were not singled out, according to the Court below, so the actions were at least debatable and, hence, rational. *Stubblefield*, 32 Cal. App. 4th at 711-12, Pet. at A-30-32.

Thus, for actions involving property the California Court of Appeal rejected the traditional test for a Due Process violation, which defined "clearly arbitrary and unreasonable" to mean "having no substantial relation to the public health, safety, morals, or general welfare." *Village of*

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[2] A number of other causes of action were dismissed, six before trial and four after trial. *Stubblefield*, 32 Cal. App. 4th at 702. A second lawsuit brought by petitioners challenging the general plan adopted in June, 1988, has yet to be tried. *Id.* at 703 n.9.

Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). In California, political motivations have been deemed just as legitimate as health and safety. As long as the neighbors want it, zoning changes restricting the use of private property are "rational."

SUMMARY OF ARGUMENT

Several circuits and the *Stubblefield* court have adopted an approach to judicial review of alleged property deprivations that is in conflict with a number of circuits and with the philosophy and purpose behind the United States Constitution. Property rights, an explicit portion of the Bill of Rights and one of the three categories of individual rights specifically protected under the Due Process Clause, should not be restricted by clearly arbitrary and irrational government actions. When such restrictions do not relate to a legitimate purpose of government, they violate due process. The courts which require some additional injury to constitute a cognizable constitutional claim, or which rubber stamp approval for all zoning decisions based on hypothetical purposes, are departing from the precedents of this Court and the meaning of the constitutional guarantee of due process.

Courts should ensure that government decisions restricting the use and enjoyment of private property relate to a legitimate public purpose. This entails an investigation of the factual circumstances surrounding that property and the considerations of the government in its decision-making process. Proof that land use restrictions were imposed for either no reason or for an impermissible reason should be proof that the property owner was treated in arbitrary and capricious manner. The *Stubblefield* court was incorrect to hold that any constituent opposition to a development project affords a rational basis for land use restrictions. Unless this opposition is based on legitimate health, safety, morals, or general welfare concerns; it is not transformed into a rational

basis merely by being a part of the political process. The court below also seriously departed from the Constitution and from this Court's precedents in holding that the ownership of real property does not implicate a property right protected by due process. Due process includes the guarantee that one's property rights will not be interfered with in an arbitrary manner. The right to use and enjoy ones' own property is and has always been at the core of property ownership and the requirement that one show a "vested right" or "entitlement" to a particular use does violence to the plain meaning and historical purpose of the Due Process Clause.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THIS COURT SHOULD RESOLVE THE MULTIPLICITY OF CONFLICTS OVER WHETHER ARBITRARY AND CAPRICIOUS REGULATION OF PROPERTY SATISFIES DUE PROCESS

The *Stubblefield* case places squarely before this Court a number of key questions concerning how alleged deprivations of property are to be analyzed under the United States Constitution. A 31-day jury trial resulted in a jury determination that a number of respondent's actions in adopting zoning ordinances and denying petitioners' development applications did not relate to legitimate public health, safety, morals, or general welfare purposes but instead were aimed at blocking petitioners' development. The appellate court reversed this verdict, on the grounds that political motivations--the placating of constituents--are rational purposes for public officials, and that zoning ordinances that purport to apply generally will always pass rational basis review. *Stubblefield*, 32 Cal. App. 4th at 710-11.

This Court just last year announced the desire to rehabilitate the status of property protection under the Takings Clause from that of a "poor relation" compared to the other individual rights enumerated in the Bill of Rights. *Dolan v. City of Tigard*, 129 L. Ed. 2d at 321. Yet various of the circuits, as well as the State of California in this case, give short shrift to property rights when reviewing government regulations under the Due Process Clause.

The Due Process Clause guarantees against deprivations of "life, liberty, or property, without due process of law." United States Constitution Amendments V, XIV, § 1. Due process has long been understood to mean more than mere procedural formalities. Due process embraces the fundamental concept that certain government decisions must instead relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men. Certain public decisions by their very nature may be arbitrarily decided--such as the color of the wallpaper in city hall, the number of members of a board or commission, maybe even the generally applicable tax rate. But decisions to restrict the liberty of individuals or their enjoyment of their property must be justifiable by one of the legitimate ends of government, the promotion of health, safety, morals, or general welfare. "Because we said so" might be an acceptable if somewhat disserving rule for a paternalistic relationship but has no place in a system of limited government designed to protect and defend the rights of free men and women.

Lower court decisions abound upholding restrictions on the use of property without regard for the reasons behind these restrictions. This shabby treatment of property rights

under Due Process review is ameliorated somewhat by the heightened protection for property rights mandated by the Takings Clause. Thus, regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government--it must *in actuality* "substantially advance" such an end. *Dolan*, 129 L. Ed. 2d at 316; *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *Agins v. City of Tiburon*, 447 U.S. at 260; . This Court has thus recognized that the government's authority over private property is proper only when it *will further* a legitimate goal. If no such goal is furthered, then government cannot mandate a restriction on the use of property--unless it decides to condemn that property right.

The Takings Clause, however, is not a substitute for the protections of the Due Process Clause. The former guarantees only that Just Compensation be paid for the property taken, it does not stop government misconduct. The latter can invalidate the government action and could provide for the payment of actual damages to compensate for the personal injury inflicted upon an individual who has been the subject of unlawful treatment at the hands of the government. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *see also Walz v. Town of Smithtown*, 46 F.3d 162, 169-70 (2d Cir. 1995) (emotional distress and pain and suffering damages recovered for substantive due process violation); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (injunctive relief and "full tort damages" available under Due Process Clause).

Unfortunately, as will be seen below, many courts act as if the promise of private property protection under the Takings Clause were grounds to erase the word "property" from the Due Process Clause. If this situation persists, the Takings Clause would remain the "poor relation" of the other explicit guarantees such as those in the First Amendment.

Stubblefield affords this Court the opportunity to correct the situation and provide firm guidance to the lower courts.

This area of the law has been described as one "not known for its simplicity." *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987). The wide variety of approaches used by the various courts (and impressively catalogued in the Petition for Writ of Certiorari) indeed pose a daunting challenge to practitioners in the field of land use. Yet the issues can be boiled down to a few simple but important questions over which the courts are badly split: Are zoning and other decisions affecting the use and enjoyment of property immune from a substantive due process attack by their very nature? May motives and the background circumstances of such decisions be probed by fact finders to decide if any purpose (particularly an improper purpose) was the basis of these decisions? And are political concerns such as the demands of constituents a legitimate purpose to support restrictions on the use and enjoyment of private property?

A. Are Zoning and Other Decisions Affecting the Use and Enjoyment of Property Immune from a Substantive Due Process Attack by Their Very Nature?

The circuits are split in the seriousness with which they consider zoning challenges under the Due Process Clause. It appears obligatory that the standard disclaimer that federal courts are not zoning boards of appeals be invoked[3] by

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[3] It is curious that courts do not similarly protest that employment discrimination cases threaten to turn them into boards of employment appeals. *Cf. DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 n.11 (3d Cir.) (federal courts have not been overrun by plaintiffs denied occupational licenses), *petition for cert. filed*, 64 U.S.L.W. 3084 (July 28, 1995) (No. 95-163).

certain circuits, which deride zoning challenges as "run of the mill," "typical," "ordinary," etc.[4]

At this extreme end of the range appears to be the view that zoning laws are the raison d'être of local government and are thus immune from serious facial challenge. This approach stems from a unfortunate philosophical premise that government has as its mission the regulation of property rather than the protection of property rights. The latter premise would uphold regulations that are intended to prevent injury to the property rights of citizens by placing reasonable limits on what others could do. The former premise gives carte blanche to regulators because regulation is what they are supposed to do.

Some of the circuits which indulge the land use regulatory process go so far as to explicitly adopt a double standard when considering due process challenges to such decisions. The Seventh Circuit "requires that 'in addition to showing that [a zoning] decision was arbitrary and irrational, the plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies.'" *Hartland Sportsman's Club, Inc. v. Town of Delafield*, 35 F.3d 1198, 1202 (7th Cir. 1994) (quoting *Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989). In the First Circuit, "arbitrary and malicious" action or a decision made in "bad-faith" are not of "*constitutional* dimension" when the deprivation alleged is of property. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990). That circuit requires conduct that is "shocking or violative of universal standards of decency" to rise (or, more accurately, sink) to the level of

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[4] *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) ("too typical of the run of the mill dispute"); *Coniston Corp.*, 844 F.2d at 467 ("garden-variety zoning dispute"); *see also Stubblefield*, 32 Cal. App. 4th at 712 ("an ordinary dispute").

a constitutional claim. *Id.* (quoting *Furtado v. Bishop*, 604 F.2d 80, 95 (1st Cir. 1979)). The Eighth Circuit requires that property owners "establish that the government action complained of is 'truly irrational,' that is, 'something more than ... arbitrary, capricious, or in violation of state law." *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (citing *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (quoting *Lemke v. Cass County*, 846 F.2d 469, 470-72 (8th Cir. 1987) (en banc) (Arnold, J., concurring)).

The *Stubblefield* court adopted the First Circuit's "shocks the conscience" standard for "substantive due process in the land use context." *Stubblefield*, 32 Cal. App. 4th at 709-10, Pet. at A-28-29. The conflict between this approach and the traditional "no substantial relation" *Euclid* standard used by this Court and most circuits, Pet. at 14-15, should be resolved by granting the petition for writ of certiorari.

B. May Motives and the Background Circumstances of Such Decisions Be Probed by Fact Finders to Decide if any Purpose (Particularly an Improper Purpose) Was the Basis of These Decisions?

If government is not given a free pass in zoning decisions, then the Court should announce just how lower courts are to determine if zoning decisions--both the passage of legislation and the adjudication of permit applications--are "clearly arbitrary and irrational." Must there be a stated purpose for the decision? Is a stated purpose taken at face value, or should the court look to see if in actuality it is a "pig in the parlor." *See Euclid*, 272 U.S. at 388 (consider restrictions "in connection with the circumstances and the locality"). If a stated purpose is not required, and is not present, will the court hypothesize a conceivable justification, or will it attempt to determine the actual motivation? And if a legitimate purpose could be fabricated by a court, but the

evidence shows either that the decision makers did not bother themselves with a purpose or had a bad, impermissible purpose in mind, is the decision arbitrary?

There is a variety of approaches to this question taken by the circuits. Some have held that an improper motive or the absence of a proper purpose is a question of fact for a jury. *See, e.g., DeBlasio*, 53 F.3d at 601-02; *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988) (for trier of fact to decide if rational basis exists). Others deny juries the opportunity to determine the actual motives of the decision makers, and will uphold zoning decisions on the basis of any conceivable relationship between a hypothesized legitimate purpose and the challenged zoning decision. *See Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244-46 (1st Cir. 1990); *Shelton v. City of College Station,* 780 F.2d 475, 482-84 (5th Cir. 1986) (en banc) (zoning decisions will be reviewed by looking for *a*, rather than *the*, basis).

This Court's past decisions should not require an extremely deferential version of rational basis review of zoning decisions. The famous *Carolene Products* footnote begins, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as *those of the first ten amendments*." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added). Unless protection of real property ownership remains a "poor relation" of the rest of the Bill of Rights, this "narrower scope" should be employed in evaluating laws that regulate real property usage, as opposed to the economic and social legislation for the workplace.

This Court has, on occasion, refused to defer to the legislative judgment behind a zoning ordinance and found a

due process violation despite *some*[5] connection between the ordinance and legitimate purposes. *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977) (ordinance prohibited members of extended family from living with grandmother). In *Moore*, the plurality cast the issue in terms of a "liberty" interest implicating the "institution of the family," *id.* at 502-04, but Justice Stevens posed the "critical question" as whether the ordinance "is a permissible restriction on appellant's *right to use her own property as she sees fit.*" *Moore*, 431 U.S. at 513 (Stevens. J., concurring in the judgment) (emphasis added).

This Court's reluctance to accept uncritically the government's explanation for a zoning ordinance, finding the ordinance unconstitutional despite the presence of a relationship to legitimate purposes, could become the model for evaluating alleged arbitrary treatment of real property usage. *Stubblefield* presents this Court with an unusual opportunity to resolve the Circuit conflicts on this issue in a manner that addresses both the role of the fact finder and of the court and, if necessary, the difference between review of legislation (the zoning amendments) and its administration (the denials of development and grandfathering permits).

C. Are Political Concerns Such as the Demands of Constituents a Legitimate Purpose to Support Restrictions on the Use and Enjoyment of Private Property?

If courts are to scrutinize the purpose behind zoning decisions, they will need direction concerning which purposes are legitimate. Does "public health, safety, morals, or general welfare" encompass decisions to restrict the use of people's property at the request of their neighbors? *See*

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[5] Albeit this relation was deemed "marginal[]" and "tenuous." *Moore*, 431 U.S. at 499-500.

Stubblefield, 32 Cal. App. 4th at 697 (opponent was "merely reflecting the concerns of his constituents").

In one sense, it is certainly not "irrational" for elected officials to make decisions on the basis of the views of their constituents--just as it similarly would be "rational" to do special favors for big campaign contributors. But to burden the liberty of individuals, or to restrict their enjoyment of the property they own, requires a legitimate public purpose. The fact that you are outnumbered in the community or failed to give as much money to elected officials as other members of the community should not have any bearing on your enjoyment of your rights. Yet, some Circuits have allowed the clamor of the crowd to dictate such decisions. *See Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995) (neighbors concern over effect on property values reasonable basis for denying permit); *Coniston Corp.*, 844 F.2d at 467 ("nothing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition"). Other circuits have considered such political motivations to be arbitrary and improper. *See Marks v. City of Chesapeake, Virginia,* 883 F.2d 308, 309 (4th Cir. 1989) (residents objected to permit for fortune teller);[6] *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (evidence that city councilmen opposed project for "partisan political or personal reasons").

This Court has held that it is a due process violation for the government to delegate to a property owner's neighbors the power to regulate that person's land. *State of Washington*

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[6] *Cf. Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 828 (4th Cir. 1995) ("[e]ven if ... appeasing the public was the only purpose behind the Board's action," decision had rational basis because the citizens expressed legitimate traffic safety and water supply concerns").

ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-23 (1928) (law requiring written consent of neighbors owning two-thirds of nearby property was a "delegation of power ... repugnant to the due process clause;" neighbors would have been "free to withhold consent for selfish reasons or arbitrarily, and may subject the [property owner] to their will or caprice"); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912) (power to request establishment of building line without reviewable standards was Due Process violation; neighbors could invoke ordinance "solely for their own interest, or even capriciously"). These cases were not upset by this Court's subsequent decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (1976), which pointed out the difference between a referendum of the entire voting public and "standardless delegation of power to a limited group of property owners."

If one's neighbors cannot be given the power to decide one's land use, these neighbors' opposition to a proposed use, without more, should not supply the grounds for a rational basis. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (under rational basis equal protection review, neighbors' "mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding, are not permissible bases") (emphasis added). This Court should grant the petition for writ of certiorari to settle this conflict over permissible purposes for land use regulations.

II

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER OWNERSHIP OF PROPERTY IS A SUFFICIENT INTEREST TO RECEIVE DUE PROCESS PROTECTION

The *Stubblefield* court also adopted the notion that ownership of private property does not involve a property interest protectible by the Due Process Clause. This bizarre

decision cannot be shrugged off as an anomaly, as several Circuit Courts of Appeals have also rejected the basic idea that ownership of property entails use and enjoyment of that property. These courts look instead for a "vested right" or "entitlement" to a particular permit in order for Due Process protections to be triggered.

This question should have been settled long ago. In 1829, speaking through Justice Story, this Court held that the American Revolution settled it, resulting in a government for which it would be repugnant to its very nature that "the rights of property are left solely dependent upon the will of a legislative body without restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). The *Wilkinson* Court declared, "[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred," *id.*, and stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58.

The passage of the years has not undermined recognition of the fundamental basis of property ownership in the American political system. For example, in discussing the importance of procedural due process to reduce the likelihood of *substantively* unfair treatment of property owners, this Court explained, "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's *right to enjoy what is his*, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (emphasis added).

One would think it obvious that fundamental to the ownership of property is the use and enjoyment of that property, and that restrictions on such use would definitely implicate the Due Process Clause. But the *Stubblefield* court instead adopted the view that a property owner challenging the denial of a development permit must have a "vested

right" under state law--the right to receive that permit--in order to assert a Due Process claim. *Stubblefield*, 32 Cal. App. 4th at 707-08. Unless one can demonstrate an entitlement under state law to erect a certain building, one cannot complain about the government's refusal to allow it to be built.

A similar approach is taken by a number of federal Courts of Appeals. The Second, Fourth, Sixth, and Eleventh Circuits all require the showing of the right to receive permission for a particular use of property in order to make out a Due Process claim.[7] There is a sharp conflict between the circuits on this issue, as several Courts of Appeals have recognized that it is basic to ownership of property that one receive due process of law when use is restricted. *See, e.g.*, *DeBlasio*, 53 F.3d at 601 ("one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership"); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest."). *See also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977) (purchaser's "right to be free of arbitrary or irrational zoning actions").

The circuits that do not consider property to be property protected by the Due Process Clause have relied on

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[7] *RRI Realty Corp., Inc. v. Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (must show no discretion in issuance of permit, or that issuance is "virtually assured" if under "narrowly circumscribed" discretion); *Sylvia Development*, 48 F.3d at 826 (must establish "legitimate claim of entitlement"); *Triomphe Investors*, 49 F.3d at 202 (need "legitimate claim of entitlement" to permit or "justifiable expectation" it would be issued); *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894-95 (11th Cir. 1989) (property owner lacked "vested right" to permit).

this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). But *Roth* merely held that a "legitimate claim of entitlement" to a "benefit," in that case a nontenured teaching position, was needed to trigger certain procedural protections. *Id.* *Roth* was broadening the class of claims that come under Due Process protection, not contracting them, by recognizing that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72. It is incredible that Roth could be read to mean that land ownership is not protected by due process.

This approach misapprehends what is at stake in due process land use claims. Unlike a professor seeking continued employment, property owners are not claiming the right to a government-established benefit when they seek to make use of their property. *Nollan*, 483 U.S. at 833 n.2 ("the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'governmental benefit'"). One of the defining characteristics of property ownership is that the owners get to use their land. The permit process does not confer any benefits or rights upon the successful applicants. To the contrary, this process ***restricts*** existing rights to ensure that uses of property do not impair the rights of others. It is a process that *protects* rights, rather than confers them.[8]

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[8] *See River Park*, 23 F.3d at 166. "Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. ... Licenses, permits, ... and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself."

CONCLUSION

In order to ensure that property rights are not treated as a "poor relation" of the rest of the rights guaranteed in the Bill of Rights, property owners' claims based on due process protections against arbitrary and irrational government actions must be given meaningful review by the courts. In *Stubblefield*, the California Court of Appeal refused to accept that a violation of due process could be found based on a jury's finding that a number of land regulation activities--including both zoning ordinance amendments and development applications--did not substantially relate to any public health, safety, morals, or general welfare purposes. The court below accepted these actions as politics as usual and found that a city councilman's personal vendetta against a landowner and its proposed development was justified by the opposition to the development on the part of the elected official's constituents. The court also held that real property ownership alone, without the right to a government-created "entitlement" to a particular usage, does not implicate property rights protectible under the Due Process Clause.

In order to settle a large number of conflicts between the circuits on the important issues relating to due process protection of property, amicus respectfully requests that this Court grant the petition for writ of certiorari.

DATED: September, 1995.

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No. 95-114

In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION CO. and
STUBBLEFIELD PROPERTIES,

Petitioners,

vs.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California
Fourth Appellate District, Division Two

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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HPP

QUESTIONS PRESENTED

1. Does a city violate the due process clause of the Fourteenth Amendment when its actions to defeat a proposed use of property are plainly arbitrary, irrational, and unrelated to any legitimate interest?

2. Must a property owner prove the existence of a "vested right" or other specific entitlement under state law in order to receive the protection of the due process clause of the Fourteenth Amendment?

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law firm that litigates in support of fundamental individual liberties, including the right to own and use private property. Our cases frequently pit ordinary individuals seeking to enjoy their basic rights against overzealous local regulators. We believe this case presents an issue of profound public and constitutional importance: whether substantive limits apply to government's power to regulate land use. Accordingly, we offer our views on why we believe the Court should grant the petition for writ of *certiorari*.

The Institute has received the consent of the parties for the filing of this brief and letters of consent have been filed with the Clerk.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW IN ORDER TO PROVIDE SUBSTANTIVE LIMITS ON WIDESPREAD ABUSES OF GOVERNMENT POWER WITH RESPECT TO THE USE OF PROPERTY.

The Petition paints a stark picture of an egregious abuse of individual rights: the manipulation of the zoning and planning process by government officials with the intent and effect of denying a property owner the opportunity to develop private property (Petition at 4-10 and A-5-12). The proposed apartment complex conformed to local standards and required no special variances, and therefore required only ministerial approval, which in

normal circumstances apparently would have been forthcoming. Instead, local officials willfully obstructed the development by singling out the proposed project for discriminatory treatment and by constantly changing the rules along the way to achieve the desired outcome. Following a 31-day trial, a state court jury found that the city's actions were not substantially related to a legitimate government interest and had damaged the plaintiffs in the amount of $11.54 million (Pet. at A-42-45). The California Court of Appeals reversed, finding that "[s]uch activities merely represent the democratic process at work" (Pet. at A-36 n. 19).

Two factors magnify the importance of this case. First, although the facts present a stark example of overzealous government regulation, the circumstances are not at all atypical. Second, in many jurisdictions property owners cannot obtain meaningful legal recourse against such actions, no matter how oppressive.

In recent years, government has grown at every level, but most explosively at the state and local levels. The largest growth has occurred in unelected boards and commissions that are not directly accountable to the public through democratic processes. See Bolick, *Grassroots Tyranny* 76-79 (1993). In many instances, these officials wield the machinery of local government in petty, arbitrary, and malicious ways that have the effect of denying individuals the basic right to own, use, and enjoy private property. See, e.g., Bolick at 111-121; Bovard, *Lost Rights* 17-38 (1994). See also *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Recourse to democratic processes in such

instances often is unavailing, not only because the officials are frequently unelected, but because the victims are usually individuals who bear alone the entire weight of the government's decision.

Not every instance of overzealous government regulation is unconstititional, of course, but nor is every government regulation constitutional. As the U.S. Court of Appeals for the Fifth Circuit observed in *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1044-46 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983),

> We certainly have no wish to challenge the legitimacy of many, even most of the statutes, ordinances and regulations issued by the innumerable legislatures and agencies in our modern and complex society. The era of *Lochner v. New York*, 198 U.S. 405 (1905), is happily long ended. Nevertheless, recognition of the multiple problems and needs of our contemporary world does not oblige us to discard the basic principles of constitutional government to which we have always been committed. . . .
>
> It is not the courts alone who are bound to respect these freedoms. Executives and legislatures, from the nation's capital to the smallest village, are called upon to respect, enforce and cherish these principles of liberty and personal autonomy.

The two principal constitutional protections against excessive government regulation of property are the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment. Neither yet has been construed to fully protect individuals against the "play

and action of purely personal and arbitrary power," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), that it was a core purpose of the Fourteenth Amendment to prevent.

Although this Court has applied the Fifth Amendment to require compensation for regulatory takings, it has thus far limited such relief to instances where the full value of the property is diminished. See, e.g., *Lucas*, 112 S.Ct. at 2894. Moreover, the requirement of ripeness in the takings context means that a property owner must exhaust administrative remedies before obtaining redress. See, e.g., *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Ripeness can be thwarted by recalcitrant government officials by endlessly delaying "final" decisions or by creating new administrative hurdles. Even when redress for a taking is provided, the form is monetary compensation rather than injunction against wrongful government action.

Likewise, procedural due process protections are unvailing where, as here, the problem is not too little "process" but too much. Hence, substantive due process protections are necessary to prevent officials from "abusing governmental power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). As the Ninth Circuit has observed,

> To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power.

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989), *cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n*, 494 U.S. 1016 (1990). Unlike takings claims, substantive due process actions are ripe when the abusive actions occur, see, e.g., 882 F.2d at 1402-04 and 1407; and do not require a showing that all use of the property is taken. See, e.g., *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). Accordingly, substantive due process provides an important constitutional limitation on the ability of government officials to misuse their power and violate private property rights. Guidance by this Court is necessary to define the scope of this vital protection.

II. THE CIRCUITS ARE HOPELESSLY DIVIDED OVER THE STANDARDS APPLICABLE TO SUBSTANTIVE DUE PROCESS CLAIMS IN THE PROPERTY RIGHTS CONTEXT.

Perhaps no other question of constitutional law is in a greater state of cacophony than the parameters governing substantive due process claims in the property rights context. More specifically, the circuits are sharply divided, sometimes internally, over whether and under what circumstances a substantive due process claim can arise for denial of a development permit. As a consequence, it is impossible for individuals to know the extent of their rights or to effectively or consistently protect those rights. Similarly, government officials cannot comport their actions to due process standards if those standards are unknowable.

The court below ruled that no substantive due process claim can be stated unless government officials violate a "vested right" – in this case, a development permit (Pet. at A-23-26). The implication of this is that the denial of a permit – no matter how arbitrary – cannot give rise to a substantive due process claim. Hence, as here, even if a proposed project is consistent with then-applicable zoning standards and the property owner complies with all applicable requirements, government officials are free to single out the proposed project for adverse treatment and to change the rules and procedures even for malicious purposes. The more successful the Machiavellian machinations, the less likely the property owner will ever be able to challenge such actions.

Despite the fact that federal constitutional protections ostensibly are uniform, the legal standards and outcome in this case would vary markedly depending on the jurisdiction in which petitioners find themselves. The federal circuits divide generally into three widely divergent categories regarding substantive due process standards in the context of denials of development permits. Even within these categories there are nuances and exceptions, but the general categories are as described below.

The First Circuit, which was followed by the court below, has not recognized substantive due process claims in the context of zoning decisions and development permits, deferring completely to state law and processes. See, e.g., *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).

The majority of circuits adhere to some form of the Second Circuit rule that to state a substantive due process claim, a property owner must show a property interest and that the government official acted arbitrarily and capriciously in denying the permit.* In *Brady v. Town of Colchester*, 863 F.2d 205, 213 (2nd Cir. 1988), the court required the plaintiffs to demonstrate a "legitimate claim of entitlement to the issuance of a license or certificate," in that "absent the alleged denial of due process, there is a certainty or a very strong likelihood that the application would have been granted." See also *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989); *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990) (also requiring a showing that state law remedies are inadequate or that some other federal constitutional right also has been violated); *D.C.A. Dev. Corp. v. Ogden City Mun. Corp.*, 965 F.2d 827 (10th Cir. 1992); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994) (applying equitable estoppel to the city's actions). Depending on the precise test applied by these circuits, the plaintiffs here likely would have stated a substantive due process cause of action.

Finally, the Third and Ninth Circuits focus on the actions of the government officials to determine whether denial of a proposed land use was arbitrary or malicious.

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* The Eighth Circuit apparently is torn between the First and Second Circuits' approaches. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

This standard is met if, as here, the denial was for reasons unrelated to the merits of the application. See, e.g., *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988); *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253 (3rd Cir. 1995); *Sinaloa Lake, supra*; *Bateson v. Geisse, supra*. This approach provides the greatest protection for property rights, for it assumes that property owners acting within established legal parameters may freely use and enjoy their property unless some legitimate police power justification exists to prevent such use.

Plainly, the courts are hampered by "the lack of guidance from the Supreme Court for the proper analysis of a claim alleging a substantive due process right regarding property interests." *Holskin v. City of Chicago*, 29 F.3d 1145, 1148-49 (7th Cir. 1994). We urge the Court to give greater definition and protection to private property rights by reviewing this case and providing definitive guidance on the important legal issues presented.

CONCLUSION

This case concerns essential individual liberties and issues of widespread public importance, on which the lower courts are divided and jurisprudence is muddled. For these reasons, the Court should grant the petition for writ of *certiorari*.

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In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

1. The principal argument advanced in the Brief For Respondent In Opposition ("Opp. Br.") is that Stubblefield cannot attack the legal standard applied below because "they got review of their substantive due process claim under the very legal standard that they say they are entitled to: the *Euclid* rational basis test." Opp. Br. at 9; *see also Id.* at 2, 10, 12, 16. According to respondent, the court "quoted the *Euclid* standard . . . and said again and again that it was evaluating the City's conduct here under that standard." *Id.* at 10. The fallacy in that argument is the

Court of Appeal did not apply, or even purport to apply, the *Euclid*[1] rational basis test.

A passing reference to the *Euclid* case appears in one footnote discussing the case's procedural history, the court merely observing that the first question in the jury's verdict form (App. A43) was apparently derived from the *Euclid* case. App. A3 n.1. Nowhere else in the opinion does the court cite, much less discuss or apply, the *Euclid* test.

Respondent apparently believes that the lower court's five recitations of the phrase "arbitrary and irrational" constitutes application of the *Euclid* test. The court uses the phrase "arbitrary and irrational" twice in describing what Stubblefield argued (App. A21 n.10, A26); once in citing to *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (one challenging legislation carries burden of establishing that legislature acted in "arbitrary and irrational" way); and twice in concluding that plaintiffs did not, "as a matter of law," show "arbitrary or irrational government action." App. A29.

But make no mistake about it, repetition of the mantra, "arbitrary and irrational," is not what the *Euclid* rational relation test is all about. That much is clear from the seminal articulation of the test in *Euclid* itself ("arbitrary and unreasonable, *having no substantial relation to* the public health, safety, morals, or general welfare") and from this Court's application of the *Euclid* test in subsequent cases. The test does not give a court *carte blanche* to

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[1] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)

apply its subjective notion of what is arbitrary or irrational. Rather, it requires a court to determine: (1) if the challenged action serves a legitimate governmental purpose, and (2) if the means employed are rationally related to the legitimate purpose. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977). The opinion below, like the First Circuit opinions it blindly follows, does neither.

Had the lower court actually applied the *Euclid* test, it would have reached a different result. It unabashedly concedes that the actions of Steve Marks and the City Council "were taken with the Stubblefield project in mind, *and were taken for the purpose of blocking the project . . .* " (App. A35 (emphasis added)); that the urgency ordinance changing the long-established policy of processing development projects under the rules in effect at the time an application was filed had "[n]o justification . . . except the desire to block approval of the Stubblefield project" (App. A8); and that the two-story height limitation and related conditional use permit requirement were "aimed at the Stubblefield project" (App. A7-A8).[2] The court never made the required *Euclid* inquiry to determine whether creating intentional roadblocks to a *ministerial* project approval is a legitimate governmental purpose.[3]

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[2] The height limitation and conditional use permit requirements were not only "aimed" at the project, they were specifically intended to block approval of the project. Three members of the council and the planning director so testified. RT 1268, 1465, 2352-53, 2142-43.

[3] Respondent suggests that the project required "some ministerial and some discretionary" approvals. Opp. Br. at 2. The unrefuted record, however, establishes that all approvals for a

Furthermore, even if the court had made that inquiry and had, by some inexplicable leap of legal logic, deemed such an objective to be legitimate, it would still have been required to examine the *means* used to accomplish the objective. Here, the court should have asked, at a minimum, whether legislative manipulations, intentional delays, misleading assurances, deliberate threats, and intimidation of staff and council members comprised rational means for achieving legitimate goals. It did not.

Respondent tries to cover for the court's failure to perform an ends/means analysis. It states that the court "concluded" that Stubblefield's claim failed "because the City's conduct was not legally irrational in that it is not sufficiently keyed to any legitimate state interests." Opp. Br. at 7 (internal quotations deleted). But the court never reached such a conclusion: the quoted language merely appears in the middle of a lengthy, two-page quotation from *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992). App. A28.

To further bolster its argument that the lower court applied *Euclid*, respondent states that the court determined the City's conduct "plainly had a rational relation to the legitimate public purposes of neighborhood preservation and environmental quality." Opp. Br. at 8. That analysis is nowhere in the opinion. Nor did the

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"Review of Plans" ("ROP") were ministerial. App. A46-A49. The fact that the City Council ordered preparation of an environmental impact report when none was required under the ROP procedures (App. A50-A51), merely establishes that the City imposed an unjustified requirement.

court below find that the City had applied certain zoning measures so Stubblefield would not "contravene and thus undermine the citywide standards established in the zoning rules. . . . " *Id.*[4] The court below did not cite *Euclid*, quote *Euclid*, analyze *Euclid*, discuss *Euclid*, or in any manner apply *Euclid*. In pointed contrast to respondent's argument, the court did not apply the standard urged by Stubblefield.

2. Respondent's second argument is that the different substantive due process formulations in the circuits "may not actually amount to any meaningful, outcome-determinative difference," and that "it is hardly clear that the First Circuit truly has an 'abberant position' on this issue." Opp. Br. at 13. This incredible assertion is not only at odds with the observations of other circuits,[5] but it is refuted by the language employed and the analytical process applied in the First Circuit cases themselves. Indeed, the First Circuit substantive due process cases are

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[4] Stubblefield's project not only met all requirements of the Review of Plans procedure (RT 1294-95; App. A51), it met all requirements of the new R-3 zoning ordinance except the two-story height limitation inserted solely to effect its demise. RT 2432-33; 2578. There was no legislative record or trial evidence suggesting any purpose, much less a "legitimate" purpose, for the 2-story height limitation.

[5] *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (in First Circuit, substantive due process is not violated "even when accompanied by claims of purposeful, malicious obstruction of a landowner's rights"), and *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986) (First Circuit has consistently held § 1983 claims may not be based on denial of permit, even if malicious, in bad faith, and for invalid and illegal reasons).

palpably distinguishable from those decided by the majority of circuits in two respects: they do not apply a *Euclid*-based end/means analysis, and they refuse to examine objectives or motives of government officials charged with misconduct.

The frequently cited First Circuit substantive due process cases (relied upon by the court below) do not even cite *Euclid*. *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 844 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *PFZ Properties*, 928 F.2d 28. Neither do they inquire into the government's objectives or the means used to achieve them.[6] Rather, they make a generalized, *ad hoc* determination of whether or not the claim is a "typical run of the mill dispute between a developer and a town planning agency." *Creative Env'ts*, 680 F.2d at 833. For if "[t]he claim that denial of the permit was improperly motivated [is] unsupported by an allegation of the deprivation of a specific constitutional right, [it] simply raises a matter of local concern. . . . " *Chiplin Enters.*, 712 F.2d at 1527. *PFZ Properties* held that delaying tactics and refusal to issue permits for the plaintiff's project based on considerations outside its jurisdiction, without more, did not rise to the level of a substantive due process violation. 928 F.2d at 32.

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[6] The same is true of *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994) and *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991), which are cited by respondent (Opp. Br. at 13), and of *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983).

In sharp contrast to the First Circuit are those circuits which not only cite *Euclid*, but actually apply its two-part test, analyzing the government's purpose and the rationality of the government's means. This is evident in *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993); *Geo-Tech Reclamation Indus., Inc. v. Hamrick, III*, 886 F.2d 662, 666 (4th Cir. 1989); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5th Cir. 1986) (*en banc*); *Pearson v. City of Grand Blanc*, 961 F.2d at 1211, 1223 (6th Cir. 1993); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990); *Sinaloa Lake Owners' Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989); *Halvorson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1995); and *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989).

To test the conflict between the First Circuit and other circuits, one need only compare *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 15990 (1995) (*en banc*), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 22, 1995) (No. 95-249), or *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), where the courts found liability, with *Creative Env'ts.*, 680 F.2d 822, or *PFZ Properties*, 928 F.2d 28, where the courts denied liability, finding that the claims were merely everyday planning disputes. All four cases involve landowners subjected to abusive, delaying tactics in the development process. The Third and Sixth Circuits found liability; the First did not.

A principal reason for this split is the majority of circuits' willingness to examine motives and purpose underlying official conduct. Under the *Euclid* test, in

order to determine if the purpose or objective of governmental conduct is legitimate, a court must examine the motives of those acting on behalf of the government. Where the First Circuit, and now California state courts, consider motives to be "irrelevant," other circuits properly consider motives to be paramount.[7]

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[7] *See, e.g., Bello v. Walker,* 840 F.2d 1124 (3d Cir. 1988), *cert. denied,* 488 U.S. 851 *and* 488 U.S. 868 (1988) (council members interfered with development process for partisan political or personal reasons unrelated to the merits of the application); *Blanche Rd. Corp. v. Bensalem Township,* 57 F.3d 253 (3d Cir. 1995), *reh'g denied,* 1995 U.S. App. LEXIS 15990 (1995) (en banc), *petition for cert. filed,* 64 U.S.L.W. 3122 (U.S. Aug. 22, 1995) (No. 95-249) (defendants intentionally conspired to impede project development for reasons unrelated to an appropriate government purpose); *DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 601 (3d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3086 (U.S. Aug. 8, 1995) (No. 95-163) (genuine issue of fact existed as to whether defendant improperly interfered with zoning decision for personal reasons); *Marks v. City of Chesapeake,* 883 F.2d 308, 313 (4th Cir. 1989) (deliberations impermissibly tainted by irrational neighborhood pressures); *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990) (defendants' actions motivated by political pressure from neighbors rather than legitimate regulatory concerns); *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir. 1991) (citing *Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir. 1989) (deprivation of constitutional stature if undertaken for improper motive and by means that are pretextual, arbitrary and capricious, and without rational basis)); and *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536, 1549 (11th Cir. 1994) (deprivation of property interest rises to level of substantive due process violation if done for improper motives and achieved through means that are arbitrary and capricious and lacking any rational basis).

3. Finally, respondent attempts to divorce the lower court's opinion from those of the First Circuit on which it relies, arguing that "no court imposes a more demanding standard than the rational relation standard applied by the court below . . . " (Opp. Br. at 9), and that the First Circuit position "demands *less* justification from local governments than the rational relation test that was applied. . . . " Opp. Br. at 12. As shown, however, the court below did not apply the *Euclid* test, either expressly or implicitly. Rather, it blindly adhered to the language and approach of the trilogy of First Circuit cases, concluding without analysis that a "rational basis" existed because the City Council was responding to constituents' concerns and its actions were "general in nature."[8]

Not only have courts in the Sixth and Eighth Circuits noted the obstacles imposed by the First Circuit, *see supra,* note 5, but even the case cited by respondent, *Licari v. Ferruzzi,* 22 F.3d 433, 349-50 (1st Cir. 1994), underscores the difficulty an owner faces pursuing a substantive due process claim in that circuit: "we have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in

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[8] In fact, the R-3 ordinance height limitation was not "general," but was directed at the project (App. A7 to A8); the moratorium boundary was approved only after being gerrymandered to include the project and assuage the demands of Marks' successor (RT 1482); and the action on the grandfathering request denied Stubblefield the project approval it would have received absent the City's intentional obstruction of the development process. RT 1339.

every conceivable case." That the First Circuit felt compelled to note it could "conceive" of such a case if pressed, is all that needs to be said.

CONCLUSION

The court below transformed this Court's deferential standard (rationally related to a legitimate state interest) into an insurmountable obstacle. The decision sends a clear and unmistakable message that the ends justify the means, that as long as public officials can concoct, after the fact, some hypothetical objective which sounds "rational," they may use any means whatsoever to achieve that end. The decision signals a startling and disturbing departure from substantive due process law in the majority of circuits, opening the door for misguided public officials to trample on property owners' rights with judicially sanctioned impunity. Substantive due process should continue to serve both to deter such wrongdoing and to provide a remedy when it in fact occurs.

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